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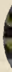

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SECOND SERIES

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95 Cal.App.2d 186

EL RIO OILS (CANADA) LIMITED, v. PACIFIC COAST ASPHALT CO., Inc. (EDGINGTON, Intervenor).

Civ. 17280.

District Court of Appeal, Second District, Division 2, California.

Dec. 20, 1949.

Rehearings Denied Jan. 9, 1950.

Hearing Denied Feb. 16, 1950.

El Rio Oils (Canada) Limited, a Delaware corporation, brought action against the Pacific Coast Asphalt Company, Inc., a California corporation, for a judgment for dissolution of defendant. Defendant filed a cross-complaint for specific performance of a contract by plaintiff to sell oil to defendant and for damages for breach of such contract. Ralph Edgington, doing business under the fictitious firm name of the "Edgington Oil Refinery", intervened, seeking recovery of damages because of failure of defendant to furnish asphalt in accordance with contract with intervenor.

The Superior Court of Ventura County, Ernest D. Wagner, J., entered a judgment denying dissolution of defendant and entered a judgment for defendant on the cross-complaint and for intervenor against the defendant for breach of contract, and the plaintiff and defendant appealed.

The District Court of Appeal, McComb, J., affirmed the judgment and held that there was not such internal dissension between stockholders of defendant as would justify its dissolution, that contract between plaintiff and defendant was enforceable, that plaintiff was entitled to damages for breach thereof, and that defendant was liable to intervenor for damages for breach of contract.

Moore, P. J., dissented.

1. Appeal and error 🔑712

An appellate court will not consider matters not appearing in record.

2. Appeal and error 🔑1010(1)

Where there is substantial evidence to support findings, a reviewing court will not look further into the evidence. Code Civ. Proc. § 1847.

3. Specific performance 🔑121(9)

In action for a judgment for dissolution of defendant corporation, wherein defendant filed a cross-complaint for specific performance of alleged contract whereby plaintiff was to sell oil to defendant for manufacture of asphalt, evidence sustained finding that plaintiff entered into such contract for sale of oil to defendant for life of plaintiff's wells.

4. Corporations 🔑448(3)

Where agreement which oil company made with lessors for sale of company's oil during life of wells, contemplated the formation of a corporation by lessors and oil company to manufacture asphalt and was for benefit of corporation, the contract was enforceable by corporation after its organization.

5. Corporations 🔑432(12)

Testimony of managing directors of oil company that they were agents of company with power to handle the affairs of the company, sustained finding that they were authorized to enter into contract to sell oil.

6. Principal and agent 🔑21, 121

Where question of existence of an agency is involved, testimony of agent is competent to establish fact of agency and extent thereof.

7. Contracts 🔑10(4)

Where plaintiff promised to sell all its oil to defendant, and defendant promised to take its entire requirements of oil from plaintiff and to use its best efforts to develop a market for oil produced by plaintiff, contract possessed sufficient mutuality to be enforceable.

8. Sales 🔑19

A promise to buy all that promissor requires or needs in its business from promisee constitutes a valid consideration for vendor's promise to furnish goods or merchandise which the promisor may need.

9. Frauds, statute of 🔑49

A contract is invalid under statute of frauds only where by its very terms it cannot be performed within a year from date it is made, and fact that it is not probable or likely to be performed within a year from date it is made does not make it invalid if, by its terms, it is possible that contract may be performed within a year after it is made. Civ. Code, § 1624, subd. 1.

10. Frauds, statute of 🔑49

Oral agreement to sell oil was not invalid under statute of frauds, since it was possible that within a year the wells might have been pumped dry or that for some other reason it would be no longer feasible to produce from wells. Civ. Code, § 1624, subd. 1.

11. Estoppel 🔑52

The essence of the doctrine of "estoppel" is that one party has by false or fraudulent language or conduct led another to do that which he would not have otherwise done, with result that he has suffered injury.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Estoppel".

12. Estoppel 🔑116

Where there was a total absence of any evidence that defendant made any fraudulent representations to plaintiff on which plaintiff acted to its detriment, defendant was not estopped from claiming that plaintiff was not excused from performing its contract.

13. Specific performance 🔑68

Where refinery of asphalt company was designed to refine oil from oil company's wells which was of a heavy gravity and high sulphur content, refinery was located close to the wells and connected by direct pipe line with them, and if another source of oil should be available to asphalt company it would be put to great expense to obtain and use such other oil, court properly ordered specific performance of the contract.

14. Specific performance 🔑129

In action for dissolution of defendant corporation, wherein defendant sought specific performance of contract by plaintiff to sell oil to defendant, proper measure of defendant's damage was loss of profits suffered by defendant.

15. Corporations 🔑612

Where none of the grounds for involuntary dissolution of a corporation existed, and action for dissolution of corporation was brought solely for purpose of avoiding contractual obligation of plaintiff to corporation, plaintiff was not entitled to decree dissolving corporation. Corporations Code, § 4651.

16. New trial 🔑102(1)

Before a motion for a new trial will be granted on ground of newly discovered evidence, moving party must show to satisfaction of court that he had exercised reasonable diligence in endeavoring to discover and produce such evidence at original trial.

17. New trial 🔑102(1)

Where plaintiff failed to show that it could not have produced newly discovered evidence at trial, court properly denied motion for new trial on ground of newly discovered evidence.

18. Appeal and error 🔑187(4)

In absence of an objection in trial court to an order permitting the filing of a complaint in intervention, a party may not, for first time on appeal, urge error in making of such order.

19. Appeal and error 🔑187(4)

Where defendant did not object in the trial court to intervention by intervenor, defendant could not object for the first time on appeal.

20. Appeal and error ⚷882(4)

Where plaintiff requested that intervenor enter case, plaintiff could not complain on appeal because of the intervention of the intervenor.

21. Sales ⚷405

Where asphalt company, in reliance on its contract with oil company to supply asphalt company with oil, entered into contract with third party to supply him with all of the asphalt which could be produced, and oil company breached its contract with asphalt company, so that asphalt company was required to breach its contract with third party, third party was entitled to recover for breach of contract by asphalt company.

22. Sales ⚷405

Where asphalt company, in reliance on its contract with oil company to supply asphalt company with oil, entered into contract with third party to supply him with all of the asphalt which could be produced, and oil company breached its contract with asphalt company, so that asphalt company was required to breach its contract with third party, there was not such impossibility of performance of contract by asphalt company as would relieve it from liability to third party.

23. Contracts ⚷309(1)

Impossibility of performing a promise that is not due to nature of performance, but wholly to inability of individual promisor, neither prevents formation of a contract nor discharges a duty created by a contract.

24. Contracts ⚷309(1)

Impossibility of performance of a contract which prevents formation of contract or discharges a duty created by a contract, must consist in the nature of the thing to be done and not in the inability of the obligor to do it, and if performance is not inherently impossible, and there is an unconditional promise to perform, nonperformance is a breach where obligor becomes unable to perform, even though through causes beyond his control, since he might have provided against them in his contract.

25. Sales ⚷418(7)

Where it would cost individual $59,810.60 in excess of that agreed to be paid by individual to asphalt company for asphalt, because of breach of contract by company, less a credit of $11,628.46 on account of difference in transportation costs where individual obtained asphalt, individual was damaged in the sum of $48,181.14 and was entitled to recover such amount.

William A. Reppy, Oxnard, and Dolley, Knight, Woods & Hightower, Los Angeles, for appellant El Rio Oils.

Durley, Todd & Fox, Oxnard, and Churchill, Teague & Romney, by E. Perry Churchill, Ventura, for Pacific Coast Asphalt Co., Inc.

Don R. Holt, Ventura, Caryl Warner, Los Angeles, of counsel, for respondent Ralph Edgington.

McCOMB, Justice.

Plaintiff appeals from (1) a judgment denying dissolution of a corporation, and (2) a judgment on the cross-complaint decreeing specific performance of a contract to sell oil and awarding defendant damages for breach of said contract in the amount of $138,299.43.

Defendant appeals from a judgment in favor of the intervenor predicated upon defendant's breach of contract in the amount of $48,181.14.

Facts

[1] Viewing the record pursuant to the rules set forth in Re Estate of Isenberg, 63 Cal.App.2d 214, 217, 146 P.2d 424, and bearing in mind that an appellate court will not consider matters not appearing in the record (People v. O'Neill, 78 Cal.App.2d 888, 892, 179 P.2d 10), the evidence discloses:

In 1937 plaintiff drilled an oil well on leased land. In 1938, with the permission of lessor, a refinery was constructed on the leased premises in which refinery plaintiff owned an interest. The purpose of the refinery was to refine and manufacture asphalt from the oil produced by plaintiff.

This venture was a failure and in 1939 plaintiff was on the verge of bankruptcy and sought the assistance of the lessors (the Chases) of the land upon which it had drilled an oil well. As a result of various negotiations plaintiff and the Chases entered into an agreement for the formation of defendant corporation. Plaintiff and the Chases were to have an equal stock ownership in defendant and each was to provide an equal share of the capital to successfully operate defendant. The Chases were to devote their time and attention to the management of defendant and plaintiff agreed to furnish for the life of the wells all oil produced on the leased premises to the extent that such oil could be used by defendant in the production and sale of asphalt and other products. It was agreed that plaintiff would not sell its oil to anyone other than defendant but that defendant could sell any oil in excess of its own requirements which plaintiff produced.

Pursuant to the agreement defendant corporation was organized and stock issued in equal amounts to plaintiff and the Chases. After defendant corporation was formed the Chases took over the active management of the company. Plaintiff did not furnish its share of the financial assets necessary for the operation of the company. Defendant company did not prosper and early in 1940, plaintiff and defendant mutually agreed to modify their original contract as to the method of fixing the price of oil sold by plaintiff to defendant. In effect it was agreed that defendant would continue its efforts to develop a market for the oil produced by plaintiff and that plaintiff would accept for the oil the price which defendant was able to pay and continue in operation. In 1943 when defendant's operations became successful this arrangement was terminated and the provisions in the original contract were resumed, to wit, that defendant should pay plaintiff the current market price for the oil purchased. In May, 1944, plaintiff and defendant agreed to another modification of their original contract by providing that plaintiff should have the right to sell to anyone the oil produced by it over and beyond the requirements of defendant. As thus modified both parties continued to operate according to the agreement through the year 1945.

In 1947 defendant entered into a contract with intervenor to sell all of the asphalt produced from the oil located on plaintiff's lease during the year 1947, and intervenor agreed to buy the same. Plaintiff had notice of this contract. Plaintiff continued to perform its agreement with defendant until on or about April 7, 1947, on which date it refused to deliver to defendant oil produced from its wells, and thereafter refused to deliver any oil to defendant. On April 7, 1947, plaintiff filed a complaint seeking the dissolution of defendant corporation on the ground that internal dissension existed between the stockholders of defendant corporation and that its business could no longer be continued with advantage or profit to the stockholders.

Defendant filed a cross-complaint against plaintiff seeking (1) specific performance of its contract with plaintiff, and (2) damages for breach of the contract. Thereafter intervenor filed a complaint in intervention seeking damages against defendant for breach of its contract with him.

Findings

The trial court found that:

1. It was not true that there was such internal dissension between the stockholders of defendant that its affairs could not be conducted with advantage or profit to the stockholders, but that the sole motive of plaintiff in filing the suit for dissolution of defendant corporation was to avoid its contractual obligation to deliver all the oil produced on its lease to defendant.

2. Plaintiff had entered into an agreement to deliver all the oil produced on its lease to defendant.

3. Defendant had entered into an agreement with intervenor to sell all the asphalt produced from the oil furnished by plaintiff to the intervenor who had in turn agreed to purchase all of said asphalt.

Judgment

The trial court entered judgment (1) decreeing specific performance of the contract between plaintiff and defendant, (2) awarding defendant damages against plaintiff for the breach of its contract, and (3) awarding intervenor damages against defendant for breach of its contract with intervenor.

Plaintiff's Appeal

Contentions of Plaintiff: First: *That there is no credible evidence to support the finding that plaintiff entered into a contract in July, 1939, for the sale of its oil to defendant for the life of plaintiff's wells.*

[2] It is the established rule that courts of appeal will not pass upon the *credibility* of evidence. Where, as in the instant case, there is substantial evidence to support the findings, a reviewing court will not look further into the evidence. Section 1847, Code Civil Procedure*; Joerger v. Pacific Gas & Electric Co., 207 Cal. 8, 24, 276 P. 1017; Bealmer v. Smith, 91 Cal.App.2d 179, 204 P.2d 642.

[3] In the instant case it is conceded that Glywn S. Chase and J. Warren Chase gave testimony which would sustain the questioned finding. We must assume that the trial court believed this testimony and resolved any conflicts therein in favor of defendant.

Second: *That the contract which plaintiff made for the sale of its oil was made with the Chase brothers personally and was not enforceable by defendant.*

[4] This proposition is untenable. The record discloses, and the trial court found, that the agreement which plaintiff made with the Chase brothers for the sale of its oil during the life of the wells on its lease contemplated the formation of defendant corporation and was for the benefit of the corporation. In other words it was a preorganization agreement made for the benefit of the corporation and hence enforceable by defendant after its organization as a corporation. (See Central Heights, etc., Co. v. Memorial Parks, 40 Cal.App.2d 591, 607, 105 P.2d 596.)

In the present case the evidence discloses that defendant after its formation as a corporation adopted and ratified the contract, relied upon the agreement, and in all particulars performed the obligation imposed upon it by such agreement.

Third: *That there is no evidence of the authority of plaintiff's agents to enter into the contract with defendant.*

[5, 6] This proposition is without merit. Mr. Roberts and Mr. Von Bohm, who were in turn managing directors of plaintiff, each testified that they were the agents of plaintiff with power to handle the affairs of such corporation. Such testimony was clearly admissible under the rule that when the question of the existence of an agency is involved, the testimony of the agent is competent to establish the fact of agency and the extent thereof. (Kast v. Miller and Lux, 159 Cal. 723, 728, 115 P. 932.)

Fourth: *That the contract between plaintiff and defendant was not enforceable because of a lack of mutuality.*

[7, 8] This proposition is likewise without merit. In consideration of plaintiff's promise to sell all its oil to defendant, defendant promised and agreed to take its entire requirements of oil from plaintiff and to use its best efforts to develop a market for the oil produced by plaintiff. Mutual promises constitute consideration. (Gallagher v. Equitable Gas Light Co., 141 Cal. 699, 707, 75 P. 329.) A promise to buy all that the promisor requires or needs in its business from the promisee constitutes a valid consideration for the vendor's promise to furnish the goods or merchandise which the promisor may need. (Marin Water Power Co. v. Town of Sausalito, 168 Cal. 587, 600, 143 P. 767; Bartlett Springs Co. v. Standard Box Co., 16 Cal.App. 671, 672, 117 P. 934. See also Cooper v. Lansing Wheel Co., 94 Mich. 272, 54 N.W. 39, 40, 34 Am.St.Rep. 341; Parks v. Griffith & Boyd Co., 123 Md. 233, 91 A. 581, 585; Williston on Contracts, Vol. I, revised ed.,

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* Section 1847, Code Civil Procedure reads: "A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and *the jury are the exclusive judges of his credibility.*" (Italics added.)

page 353, section 104-A et seq. Cf. Webber v. Johnston, 214 Cal. 378, 381 et seq., 5 P.2d 886.

California Refining Co. v. Producers' Refining Corp., 25 Cal.App.2d 104, 76 P.2d 553, is not here in point for the reason that in the cited case there was no agreement to sell and purchase all the requirements needed in the business; neither was there an agreement to develop a market for the vendor's product. Garrison v. Edward Brown & Sons, 25 Cal.2d 473, 154 P.2d 377, is not applicable since the holding of the case was simply that in the absence of an express agreement for the modification of a prior agreement there must be facts from which the court could infer or imply a modification of the original agreement.

Fifth: *That the contract between the parties not being in writing was not enforceable under the provisions of section 1624, subdivision 1, of the Civil Code, which provides that in the absence of some note or memorandum in writing subscribed by the party or his agent, an agreement that by its terms is not to be performed within a year of the making thereof is invalid.*

[9] This proposition is also untenable. A contract is invalid under subdivision 1, section 1624 of the Civil Code only where by its *very terms* it cannot be performed within a year from the date it is made. (McKeany v. Black, 117 Cal. 587, 592, 49 P. 710; Hopper v. Lennen and Mitchell, 9 Cir., 146 F.2d 364, 161 A.L.R. 282. See also Hagan v. McNary, 170 Cal. 141, 143, 148 P. 937, L.R.A.1915E, 562.)

The fact that it is not probable or likely to be performed within a year from the date it is made does not make it invalid if by its terms it is possible that the contract may be performed within a year after it is made. (See Hopper v. Lennen and Mitchell, supra.)

[10] In the present case there was nothing in the terms of the contract that prevented it from being performed within a year from the date of the agreement. It was possible that during the year plaintiff's wells might have been pumped dry or for some other reason, due to earth movements or mechanical difficulties, it would be no longer feasible to produce from them.

Sixth: *That defendant was estopped from claiming that plaintiff was not excused from performing its contract during the time involved in the present action.*

[11] This proposition is likewise devoid of merit. The essence of the doctrine of estoppel is that one party has by false or fraudulent language or conduct led another to do that which he would not have otherwise done with the result that he has suffered injury. (Seymour v. Oelrichs, 156 Cal. 782, 795, 106 P. 88, 134 Am.St.Rep. 154.)

[12] In the instant case there is a total absence of any evidence that defendant made any fraudulent or false representations to plaintiff upon which plaintiff acted to its detriment.

Seventh: *That the trial court should not have ordered specific performance between plaintiff and defendant.*

[13] This proposition is also devoid of merit. The terms of the contract between plaintiff and defendant as found by the trial court and supported by substantial evidence are definite and specific. In addition it found that defendant's refinery was designed to refine the oil from plaintiff's wells which was of a heavy gravity and high sulphur content; that the refinery was located on premises close to the wells and connected by direct pipe line with them; and that if in the future another source of oil should be available to defendant it would be put to great expense and inconvenience in order to obtain and use such oil. Under such facts the trial court was justified in requiring specific performance. (See Southwest Pipe Line Co. v. Empire Natural Gas Co., 10 Cir., 33 F.2d 248, 64 A.L.R. 1229; Hall v. Philadelphia Co., 72 W.Va. 573, 78 S.E. 755; Chas. F. Noble Oil & Gas Co. v. Altex Petroleum Co., Tex. Civ.App., 230 S.W. 758.)

Eighth: *That the trial court did not correctly assess the damages.*

[14] This proposition is likewise without merit. The proper measure of damage was the loss of profits suffered by defendant. (National Oil Refining Co. v. Producers'

Refining Co., 169 Cal. 740, 147 P. 963.) The evidence of defendant's loss is contained in numerous exhibits and testimony found in the record, which evidence was not contradicted by any evidence produced by plaintiff. Since this evidence is substantial and sustains the trial court's finding, no useful purpose would be served by setting it forth in extenso.

Ninth: *That plaintiff was entitled to a decree dissolving defendant corporation.*

[15] This proposition is totally devoid of merit in view of the fact that the trial court found, supported by substantial evidence, that none of the grounds for the involuntary dissolution of a California corporation as set forth in section 4651 of the Corporations Code existed, but that, on the contrary, plaintiff brought the action solely for the purpose of avoiding its contractual obligation to defendant.

Tenth: *That the trial court erred in denying plaintiff's motion for a new trial on the ground of newly discovered evidence.*

[16] This proposition is without merit. The law is settled in California that before a motion for a new trial will be granted on the ground of newly discovered evidence the moving party must show to the satisfaction of the court that he had exercised reasonable diligence in endeavoring to discover and produce such evidence at the original trial. (In re Estate of Hunt, 33 Cal.App.2d 358, 361, 91 P.2d 609.)

[17] In the present case plaintiff has failed to meet this requirement. There is a total absence of any showing that he could not have produced at the trial the witnesses he now relies upon.

Defendant's Appeal

Contentions of Defendant: First: *That the findings upon which the judgment in favor of intervenor are predicated are not supported by any credible evidence.*

This proposition will not be considered by us for the reasons given above in answering the first contention of plaintiff on its appeal.

Second: *That it was error to permit the intervenor to file a complaint in intervention.*

This proposition is untenable.

[18] (a) The law is settled that, in the absence of an objection in the trial court to an order permitting the filing of a complaint in intervention, a party may not urge error in the making of such order for the first time on appeal. (Bloom v. Waxman, 48 Cal.App.2d 646, 647, 120 P.2d 509.)

[19] In the present case the record discloses that defendant did not object to the intervention in the trial court. Therefore defendant may not raise the objection for the first time on this appeal.

[20] (b) Plaintiff made a motion solely on its own behalf to dismiss the complaint in intervention which was denied. This order was proper in view of the fact that plaintiff had requested that intervenor enter the case. Therefore under the doctrine of invited error, that is, that a party cannot take advantage of error committed at his request, plaintiff is not in a position to urge that the trial court erred in permitting the intervention. (Jentick v. Pacific Gas and Electric Co., 18 Cal.2d 117, 121, 114 P.2d 343.)

Third: *That the trial court erred in giving judgment in favor of intervenor because the contract with intervenor was (a) conditional, (b) rendered impossible of performance by reason of the fact that plaintiff did not deliver the oil to defendant, and (c) unenforceable on the theory of frustration.*

This proposition is likewise untenable.

[21] (a) The trial court found, supported by substantial evidence: (1) that defendant in reliance on its contract with plaintiff had entered into a contract with intervenor to supply him with all of the asphalt which could be produced from plaintiff's wells; and (2) that on April 7, 1947, plaintiff breached its contract with defendant, and by reason thereof defendant breached its contract with intervenor to his damage in the sum of $48,181.14.

The trial court found that the contract between defendant and intervenor was not conditional, but intervenor had contracted to purchase from defendant "all of the asphalt that" defendant "could produce from oil produced from" plaintiff's wells during the year 1947.

[22] (b) There was no impossibility of performance of the contract such as is contemplated by sections 454, 457, 460 and 288, Restatement of the Law of Contracts. The rule governing the instant case is set forth in section 455, Restatement of the Law of Contracts, Volume 2, as follows:

"455. Subjective Impossibility Distinguished from Objective Impossibility.

[23] "Impossibility of performing a promise that is not due to the nature of the performance, but wholly to the inability of the individual promisor, neither prevents the formation of a contract nor discharges a duty created by a contract.

"Comment:

"a. Impossibility may be due to the nature of the thing to be done or to the capacity of the person who has promised to do it. It is the difference between 'the thing cannot be done' and 'I cannot do it.' The first is objective; the second subjective. In promises that can be complied with only by the action of the promisor himself, the two kinds are united. The subjective inability of the promisor involves also the objective impossibility of performance; the impossibility is due to the nature of the performance as well as to the inability of the promisor. The rule stated in the Section is not applicable to such a case, but only to cases where the nature of the performance is such that it can be delegated to an agent or assignee. All the following sections in the Chapter relate to objective impossibility."

[24] California is in accord with the rule as above stated. The impossibility must consist in the nature of the thing to be done and not in the inability of the obligor to do it. (Potts Drug Co. v. Benedict, 156 Cal. 322, 333, 104 P. 432, 25 L.R.A.,N.S., 609.) If performance is not inherently impossible, and there is an unconditional premise to perform, nonperformance is a breach where the obligator becomes unable to perform even though through causes beyond his control, since he might have provided against them in his contract. (Coulter v. Sausalito Bay Water Co., 122 Cal.App. 480, 492, 10 P.2d 780; Wilson v. Alcatraz Asphalt Co., 142 Cal. 182, 188, 75 P. 787.)

In the present case the impossibility of performance by defendant did not consist in the nature of the thing to be done, but rather in its inability to perform the contract which it had entered into. Defendant could have protected itself against damages resulting from the facts disclosed in the present case had it provided in its contract that it should not be liable in the event plaintiff failed to deliver oil to it. Not having done so, defendant is liable for breach of its unconditional contract with intervenor.

Fourth: *That damages allowed intervenor are excessive.*

This proposition is untenable. 1. The following are the applicable code sections upon the measure of damage:

Section 1787, Civil Code, being Section 67, Uniform Sales Act, provides in regard to damages to the buyer, as follows: "(1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for nondelivery.

"(2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.

"(3) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."

Section 3354, Civil Code provides as follows:

"Buyer's Loss.—In estimating damages, except as provided by sections three thousand three hundred and fifty-five and three thousand three hundred and fifty-six, the value of property, to a buyer or owner thereof, deprived of its possession, is deemed to be the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice, with reasonable diligence, for him to make such a purchase."

2. The trial court, predicated upon substantial evidence, made the following findings:

"XIII. That the price of crude oil during the year 1947 did not increase over and above the price of 51¢ per barrel, and that the price of the same during all of the year 1947 was 51¢ per barrel.

"XIV. That intervenor will between said 1st day of April, 1947, and said 1st day of January, 1948, use, need and require for the purpose of performing its contract and commitments, and for the sale and export thereof, a minimum of 16,074.89 tons of asphalt from the defendant Pacific Coast Asphalt Co., Inc.

"That it will cost intervenor during the year 1947 the sum of $59,810.60 in excess of that agreed to be paid by intervenor to said Pacific Coast Asphalt Co., Inc., less a credit to which said Pacific Coast Asphalt Co., Inc., would be entitled for and on account of the difference in transportation costs from the City of Oxnard, California to the City of Long Beach, California in the sum of $11,628.46, and that by reason thereof and of the foregoing facts intervenor will be damaged in the sum of $48,181.14.

"XXI. That it is true that the breach of its agreement on the part of the Oil Company resulted in the Asphalt Company being unable to refine and sell asphalt to the said Ralph Edgington and thereby caused the Asphalt Company to breach its agreement with the said Ralph Edgington."

[25] From the foregoing rules of law and findings of fact it appears that the trial court properly computed the amount of damage awarded intervenor.

The judgment is affirmed.

WILSON, J., concurs.

MOORE, P. J., dissents.

Hearing denied; SCHAUER, J., dissenting.

95 Cal.App.2d 329

McBRIDE v. McBRIDE.

Civ. 13907.

District Court of Appeal, First District, Division 2, California.

Dec. 27, 1949.

Action by E. Dorothy McBride against Rexford W. McBride, wherein defendant was ordered to pay for support and maintenance of plaintiff and their children.

The Superior Court in and for the County of San Mateo, A. R. Cotton, J., reduced payments under a previous decree in favor of the wife and denied a motion for counsel fees and costs with which to prosecute an appeal, and plaintiff appealed.

The District Court of Appeal, Goodell, J., affirmed the order denying the motion, and held that, in view of the husband's allegations that he had no means to meet such an order, refusal was not an abuse of discretion.

1. Husband and wife ⇨295, 301

In actions involving payment by husband of support and maintenance for wife and children, granting of costs and counsel fees to wife is generally a matter of discretion with the trial court.

2. Husband and wife ⇨295, 301

Order for counsel fees and costs to wife in action involving support and maintenance for herself and children should ordinarily be made when wife's testimony that she is wholly without any income stands uncontradicted and when husband can pay.

3. Husband and wife ⚷295, 301

Where husband did not deny that wife had no income and did not have sufficient money or means to pay costs and fees of counsel on appeal from decree reducing monthly payments for support and maintenance, and wife did not cross-examine husband although he denied by affidavit that he had means to pay costs and fees, denial of wife's motion for counsel fees and costs to prosecute appeal was not an abuse of discretion.

4. Appeal and error ⚷984(1)

Clear abuse of discretion only will justify interference by District Court of Appeal with judgment of trial court denying wife counsel fees and costs to prosecute appeal from order reducing payments for support and maintenance.

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Norman S. Menifee, Redwood City, for appellant.

Frank V. Kington, Redwood City, for respondent.

GOODELL, Justice.

This is an appeal from an order denying a motion for counsel fees and costs on appeal.

By an interlocutory decree on December 26, 1944 respondent was ordered to pay appellant $500 a month for the support and maintenance of herself and their three children. On December 16, 1946 the decree was modified by a reduction to $250, and on March 2, 1948 it was reduced to $50 a month. Apparently a notice of appeal from the last order was filed, although it does not definitely appear from the record. Appellant then moved for counsel fees and costs wherewith to prosecute such appeal and on denial this appeal was taken.

[1] Appellant concedes "the rule that the granting of costs and counsel fees in actions of this character is generally a matter of discretion with the trial court." That rule is well settled. Sweeley v. Sweeley, 28 Cal.2d 389, 393, 170 P.2d 469; Kellett v. Kellett, 2 Cal.2d 45, 48, 39 P.2d 203. She claims, however, that in this case the court acted arbitrarily.

In her affidavit appellant states that she "has no income whatsoever and has not sufficient money or means to pay the costs of an appeal and the fees of her counsel for prosecuting" it. In his affidavit respondent does not specifically deny this but he does state "that since June, 1943, plaintiff has received from defendant moneys and properties reasonably valued as follows: cash on sale of Burlingame home $8431.23; other cash $23,270.00; cash for attorney's fees $610.00; furniture $5,000.00; Russian River home $1,000.00; automobile $1500.00." This totals $39,811.23. He then alleges that he is without the means to meet such an order and states the amount of his outstanding indebtedness, which he is unable to pay.

The allegations just quoted are not denied by appellant.

[2] We are mindful of the cases holding that an order should be made when a wife's testimony that she is wholly without income stands uncontradicted, e. g. Norris v. Norris, 50 Cal.App.2d 726, 735, 123 P.2d 847; Coleman v. Coleman, 23 Cal.App. 423, 426, 138 P. 362, but such cases presuppose a showing that the husband can pay.

As this case had been before the court on several occasions in the four years following 1944, it would seem that what was said in Kellett v. Kellett, 2 Cal.2d 45, 49, 39 P.2d 203, 205, supra, is apposite: "In passing upon the trial court's denial of plaintiff's motion for costs on appeal and for maintenance pending appeal, it is proper to take into consideration, not only the particular action that was then before the court, but other proceedings before said court relative to the marital and property rights of the parties hereto. * * * The trial court in passing upon plaintiff's motion for costs and alimony on appeal undoubtedly took into consideration the history of the litigation between the plaintiff and defendant * * * In these circumstances it was within its discretion to deny the application of plaintiff for funds to prosecute the appeal. The matter was so wholly in the discretion of the trial court that, in order to set aside its order refusing the application, a very strong case must be made out in favor of the plaintiff. We do not find the showing made by plaintiff sufficiently strong to warrant us setting aside the order of the trial court, and for that reason it should be affirmed."

[3, 4] Likewise it is difficult to find in the present record sufficiently strong grounds on which to say that the court abused its discretion. On the motion each party filed an affidavit. Respondent also appeared and amplified his affidavit, thereby submitting himself to cross-examination as to his financial condition. Appellant was not examined, and apparently did not appear, at the hearing of her motion.

"A clear abuse of discretion only will justify * * * interference with the judgment of the trial court." Wilder v. Wilder, 214 Cal. 783, 785, 7 P.2d 1032, 1033; see, also, Kenney v. Kenney, 220 Cal. 134, 138, 30 P.2d 398.

The order is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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95 Cal.App.2d 443

INDUSTRIAL INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 17296.

District Court of Appeal, Second District, Division 3, California.

Dec. 30, 1949.

Rehearing Denied Jan. 18, 1950.

Petition by Industrial Indemnity Company, compensation insurance carrier for the United Concrete Pipe Corporation, employer, for a writ to review an award of the Industrial Accident Commission in favor of Edward A. Thomas, employee.

The District Court of Appeal, Wood, J., held that the evidence was sufficient to support a finding that the accident aggravated pre-existing arthritis which, prior to the accident, was non-symptomatic, non-disabling and dormant and supported determination of the commission that there should be no apportionment of disability rating to alleged pre-existing or independently developing arthritis and affirmed the award.

1. Workmen's compensation 🔑556

Workmen's compensation is recoverable for disability which results from aggravation of a pre-existing disease if the aggravation is reasonably attributable to the accident but compensation is not recoverable for disability which results irrespective of accident from normal progress or development of a pre-existing disease. Labor Code, § 4663.

2. Administrative law and procedure 🔑784
Workmen's compensation 🔑1939

Whether employee's permanent disability resulted from effect of accident, including the aggravating effect of accident on pre-existing arthritis, or whether disability or a part thereof resulted from normal progress of pre-existing disease was for determination of Industrial Accident Commission. Labor Code, § 4663.

3. Workmen's compensation 🔑845

If a part of employee's disability results from normal progress of a pre-existing disease, rather than from effects of accident, a portion of permanent disability rating must be attributed to pre-existing disease. Labor Code, § 4663.

4. Workmen's compensation 🔑1649

Evidence supported finding that accident aggravated pre-existing arthritis which prior to accident was non-symptomatic, non-disabling and dormant, and supported determination of Industrial Accident Commission that there should be no apportionment of permanent disability rating on theory of pre-existing or independently developing arthritis. Labor Code, § 4663.

5. Administrative law and procedure 🔑722
Workmen's compensation 🔑1874

Where petition for writ to review an award of Industrial Accident Commission was deposited for filing in office of clerk of court on August 12 between 4 p. m. and

5 p. m., but clerk did not stamp the petition with his filing stamp on that date and stamped it the next morning, the petition was to be treated as filed on August 12 in determining whether it was filed within proper time.

◆

Herlihy & Herlihy, Los Angeles, for petitioner.

T. Groezinger, Robert Ball, San Francisco, for respondent Industrial Accident Commission.

WOOD, Justice.

Review of proceedings of the Industrial Accident Commission. An award was made, based upon a permanent disability rating of 55½%. Petitioner herein, which is the compensation insurance carrier for the employer, asserts that one-half of that disability rating should have been apportioned to pre-existing or independently developing arthritis.

On April 28, 1945, Edward A. Thomas, an employee of the United Concrete Pipe Corporation, was injured while he, as a welder foreman, was inspecting work that had been done in the engine room of a ship. In order to go to a certain place which he intended to inspect, it was necessary that he walk upon a "2 x 12" board—one end of which rested on the top of an engine and the other end rested on some object on the side of the room. The board was 26 feet above the floor. Above the board and under the deck, there was an angle-iron, known as a deck stiffener, which extended across the room. Mr. Thomas was holding onto the deck stiffener as he started to walk upon the board. When he stepped on the board it fell to the floor of the engine room, and then he, in order to avoid falling to the floor himself, hung to the deck stiffener with his left hand for a moment, and then he "hand-over-handed" along the deck stiffener for a distance of 20 feet to a place of safety at the side of the room. His weight was 265 pounds. He felt no discomfort at that time (about noon), and he continued to work but in the evening he noticed a little stiffness in both shoulders and arms and in the base of his neck, and about midnight he had pain therein. He did not return to work until June 10, 1945. During the time he was not working he was furnished medical treatment and was paid temporary disability compensation by the petitioner. About one week after he returned to work he was discharged.

Thereafter he obtained employment at a welding company, but after two weeks he quit that employment because, according to his testimony, the condition of his hands and arms was such that he could not do the work. He testified that during that time when he put a strain on his hands and arms they became numb and ached and that the ache extended through both shoulders. Thereafter for about five months he worked for himself manufacturing fishing tackle, but he earned only enough money to get something to eat. In the latter part of November, 1945, he was employed as a musician at $76 a week (he had been a musician before the war), but he did not get along very well because, according to his testimony, he no longer had "facility" in his fingers and there was impairment of flexibility in his fingers. He continued with that work until July, 1946, when his employer told him that "he could not make the grade." Thereafter he worked for himself manufacturing fishing tackle until November, 1947, during which time he earned about $150 a month. Then he was employed by a company which manufactured fishing tackle and he earned $40 a week.

Mr. Thomas filed his application for adjustment of his claim on August 30, 1948. The hearing of the application was had on September 23, 1948.

Mr. Thomas testified further that he never had any other injuries to his shoulders or arms; about six months after the accident involved here the employer herein (United Concrete Pipe Corporation) told Mr. Thomas' wife by telephone that it was no longer liable for medical treatment and that it was through with the accident because there was a sedimentation rate in his blood and that was the cause of his trouble; he had obtained and paid for medical treatment on his own account from Dr. Blunden, who sent him to the Good Samaritan Hospital and St. Vincent's Hospital for X-ray irradiation through both shoulders, which treatments continued over a period of 90 days; he has had numbness in his hands and arms since the accident whenever he used his hands in a rigid or stationary position while supporting a weight; he has a severe pain in his forearms, upper arms and shoulders when he lifts or holds anything of any weight; after releasing such hold he can relieve the pain by shaking his hands; he has no discomfort when he is very warm; the pain is sharper in cool weather; the function of his shoulders is impaired; pain on the right side is greater than it is on the left side because he uses his right arm more; and he has been seeing Dr. Blunden continuously since July 4, 1948, when he had a severe attack.

He was examined by Dr. Lee, the employer's physician, on May 7, 1945, who reported that the injury was a partial tear or strain of infra-spinatus tendon of the left shoulder; he estimated the period of treatment as six or eight weeks and the period of total disability as two or three weeks.

On May 22, 1945, Dr. Schroeder, the employer's physician, examined him and reported that he continues to have severe pain of a nagging character in his shoulders, that slow improvement continues, that there should be further treatment for six weeks, and there is no permanent disability.

Dr. Chipman, the insurance carrier's physician, examined him on May 31, 1945, and reported that he is apparently suffering from a strain to the muscles of the left shoulder and arm, that disability would continue another two or three weeks, that daily physiotherapy and exercises at his office were instituted, and there should be no permanent disability. Dr. Chipman examined him again on June 26, 1945, and reported that the patient has a definite leucocytosis and increased sedimentation rate indicative of some systemic local infection, and it is possible that the pain through the left shoulder and arm is caused by this systemic toxemia; there is nothing in the examination that substantiates his complaints; the patient is able to return to any type of work; that treatments should be directed to the clearing up of any systemic infection.

Dr. Feldman, the insurance carrier's physician, examined him on July 24, 1945, and reported that there is evidence of some hypertrophic arthritis on some of the cervical vertebrae and some calcific deposit in the tip of the spinous process, which is of no clinical significance; that the patient may have suffered some strain about the scapular muscles on both sides and there may have been some nerve root irritation; he has an increased sedimentation rate which indicates some systemic factor—arthritis; if he suffered any sprain he has recovered; he did not believe that the patient is disabled, and he believed that work should be beneficial.

Dr. Blunden, the applicant's physician who is an orthopedic surgeon, made a report on September 14, 1948, which stated as follows: He examined the patient in the first part of April, 1946, and thereafter in that month he treated him four times. He examined him again on July 16, 1948, and thereafter treated him six times. The patient obtained some relief from the treatments, but there remains a very considerable residue of pain, tenderness and disability. He has not been free from symptoms during the 2½ year period. In Dr. Blunden's opinion the difficulty "is probably related to the trauma which he describes in his original history—that is for a man of Mr. Thomas's weight to hang from one arm for any period of time would impose an extremely severe stress on his shoulder joints and it is entirely within the realm of possibility that a small tear could have resulted." Arthritic changes in the acromioclavicular joint are the very common cause of constant pain of the type this patient has experienced, and "Certainly such a condition could be caused by severe stress and strain, which could have been produced by the original injury or there could have been a pre-existing irritation or degeneration of the acromioclavicular joint with superimposed trauma to aggravate and promote the arthritic process which is apparently present." That the patient's condition is "due at least, in part, to his original injury as described in his history, if not entirely so." That "[i]t seems to me that this is either a condition caused by the trauma of being forced to hang on by his arms for a period of minutes or it is the result of the described trauma being superimposed on a pre-existing degenerative changes. In view of Mr. Thomas' age and his general health and vigor, I am inclined toward the former explanation." (At the time of the accident Mr. Thomas was 42 years of age.)

Dr. Johnson, a physician who examined Mr. Thomas on September 17, 1948, at the request of the attorneys for the employer, stated in his report that it is difficult for him to visualize how the patient could have in any way injured his shoulders; that he has arthritic changes involving both shoulders, and the arthritis antedates the incident; that the increased sedimentation rate, found by physicians who saw the patient shortly after the incident, is in keeping with the arthritic condition and "thus rules out the possibility of this case being occupational in origin"; and the vague sensory complaints he gives were not verified by the clinical findings.

Dr. Lee stated in a letter of September 25, 1948, that during the treatments of the patient in 1945 at the offices of Drs. Stellar, Schroeder & Lee (physicians for the employer) the patient made no complaint regarding his right shoulder.

Dr. Chipman (physician for the employer) stated in a letter of September 28, 1948, that during the visits of the patient to his office in 1945 the patient made no complaint regarding his right arm or shoulder.

Dr. Beddoe, assistant medical director of the Industrial Accident Commission, stated in his report of October 11, 1948, that the patient's disability had reached a permanent and stationary status and that no further treatment is indicated; and the factors of permanent disability are loss of grip in right hand and subjective sensations. In his supplemental report of November 23, 1948, he stated that the X-rays of both shoulders show a degenerative arthritis, but since the patient had no pain or discomfort in either shoulder prior to the accident and had pain and discomfort in both shoulders immediately subsequent to the accident, "it is my opinion that an aggravation of a pre-existing arthritis took place at the time of the injury sustained in April 1945, resulting in the present subjective sensations of the patient."

After Dr. Beddoe's supplemental report had been filed, the petitioner herein requested that he answer certain interrogatories, one of which was as follows: "If it be assumed that the applicant had no complaints in regard to his right shoulder while under the treatment of Drs. Lee and Chipman, is it true that the osteoarthritis and complaints in the upper extremity which he now has, developed independently of his injury of April 28, 1945?" Dr. Beddoe answered that question as follows: "I do not consider that the osteoarthritis in his right shoulder was caused by the injury, but, in my opinion, it was aggravated thereby, in so much as there was trauma to both shoulders at the time of the injury under consideration." Another of said interrogatories was as follows: "How much of the applicant's present disability is due to pre-existing or independently developing arthritis, as distinguished from the effects of his injury of April 28, 1945?" Dr. Beddoe answered: "About 50%."

The referee requested the permanent disability rating bureau of the Commission to give the referee the disability rating of the applicant, based upon the report and supplemental report of Dr. Deddoe. In making that request he stated to the bureau: "[I] In view of the fact that there had never been any prior complaints of upper extremity I do not intend to apportion and therefore ask specifically in figuring this rating, you ignore pre-existing arthritic process." The bureau replied that the permanent disability rating is "55½%—equivalent to 222 weeks of disability payments." The petitioner was given an opportunity, upon its request, to cross-examine the rating specialist. He testified, upon such examination, that in accordance with instructions from the referee, he merely rated the disability described in Dr. Beddoe's two reports, and he "did not undertake to apportion any part of the disability to pre-existing trouble or to this particular injury."

The Commission found, among other things, that applicant's injury caused a permanent disability of 55½% entitling him to $25 a week for 222 weeks in the total sum of $5,500. (The amount of $125 paid for temporary disability was deducted therefrom.) An award was made accordingly.

The employer petitioned for a rehearing upon the ground, principally, that the permanent disability award of 55½% is based upon applicant's entire disability without any apportionment as between the injury and the pre-existing condition. The referee, in his report on the petition for rehearing, stated that the foundation for not making an apportionment is to be found in the record where the applicant testified that he never had any prior injuries to, or prior complaints regarding, either of his upper extremities.

[1–3] As above stated, petitioner asserts that one-half of the permanent disability rating of 55½% should have been apportioned to pre-existing or independently developing arthritis. It is not asserted here that said rating of 55½% is not a correct evaluation of the extent of applicant's disability. Section 4663 of the Labor Code provides: "In case of aggravation of any disease existing prior to a compensable injury, compensation shall be allowed only for the proportion of the disability due to the aggravation of such prior disease which is reasonably attributed to the injury." Compensation is recoverable for disability which results from the aggravation or "lighting up" of a pre-existing disease if the aggravation or "lighting up" is reasonably attributable to the accident; but compensation is not recoverable for disability which results, irrespective of the accident, from the normal progress or development of a pre-existing disease. See Tanenbaum v. Industrial Acc. Comm., 4 Cal.2d 615, 617, 52 P.2d 215; Colonial Ins. Co. v. Industrial Acc. Comm., 29 Cal.2d 79, 83, 84, 172 P.2d 884. It was a question of fact for the determination of the Commission as to whether applicant's permanent disability resulted from the effects of the accident, including the aggravating effect of the accident upon a pre-existing disease, or whether the disability or a part thereof resulted from the normal progress of a pre-existing disease. If a part of the disability resulted from the normal progress of a pre-existing disease then a portion of the permanent disability rating herein should have been attributed to the pre-existing disease. The question therefore is whether there was substantial evidence to support the determination of the Commission that there should be no apportionment.

It is true that five physicians, who examined the applicant at the request of petitioner, stated in effect that the accident herein did not cause, and could not have caused, any of the permanent disability of applicant, and that the disability was due to arthritis which was neither caused nor aggravated by the injury. However, the applicant's physician, Dr. Blunden, stated (in the last paragraph of his report) that applicant's condition is either a condition caused by the trauma or it is the result of the trauma being superimposed on a pre-existing degenerative change; and that in view of applicant's age, general health, and vigor, he was inclined toward the former explanation. Petitioner argues that Dr. Blunden did not attempt to express a positive opinion one way or the other regarding the cause of disability, and therefore his report was a guess or conjecture and was of no probative value. Petitioner cites Hartford Accident & Indemnity Co. v. Indus. Acc. Comm., 140 Cal.App. 482, 35 P.2d 366, wherein it was stated that no expert witness has expressed an opinion that it is even reasonably probable that the condition of the applicant therein was due to his employment and an award may not be predicated upon a possibility which is merely conjecture. The last part of Dr. Blunden's statement, namely, "I am inclined toward the former explanation," when considered with another part of his report wherein he states that applicant's difficulty is probably related to the trauma, is in effect a statement that he is of the belief or opinion that the condition was caused by the trauma. One meaning of the word "incline," as stated in Webster's Dictionary, is "to favor an opinion." In Travelers Ins. Co. v. Ind. Acc. Comm., 33 Cal.2d 685, 203 P.2d 747, a physician testified on direct examination, regarding the cause of a death, that "there is a probability that he was suffering from lead poisoning [an injury arising out of the employment]." On cross-examination therein, he testified that perhaps the poisoning was a possibility and not necessarily a probability. The court stated therein that intellectual integrity often compels an honest physician to state that his diagnosis does not rest upon scientific certainty; and that, in reading the testimony as a whole, it was the physician's opinion that lead poisoning could not be ruled out as a contributing cause of death; and that his testimony reasonably tended to support a finding of industrial causation, and "the use of the word 'possible' under cross-examination after his expression of opinion that the disease was probable does not require the rejection of such testimony as supporting, with other evidence, the award." Petitioner asserts in effect that the case just referred to is to be distinguished from the present case in that the physician therein testified that the death was probably due to the employment, whereas in the present case the physician never expressed any opinion regarding probability. It is to be noted, however, that Dr. Blunden's report did include an expression of his opinion regarding probability. In another part of his report (in a paragraph preceding the one just discussed herein), he states as follows: "It is my opinion that the difficulty on Mr. Thomas's part, is probably related to the trauma which he describes in his original history—that is for a man of Mr. Thomas's weight to hang from one arm * * *." It therefore appears that the report was reasonably susceptible of the interpretation that Dr. Blunden was of the opinion that applicant's condition was probably caused by the trauma. Even if he had not stated that he was inclined toward the explanation that the disability was caused by the trauma, his statement, in the alternative, that it seemed to him that the condition was caused either by the trauma or by the trauma being superimposed on a pre-existing disease, was a legally sufficient medical opinion to justify non-apportionment of the disability rating.

Also, as above stated, Dr. Beddoe, the assistant medical director of the Commission, stated in his supplemental report that in his opinion an aggravation of a pre-existing arthritis took place at the time of the injury, resulting in the present subjective sensations of the applicant. In his answer to one of the interrogatories regarding applicant's right shoulder, he stated that in his opinion arthritis in the right shoulder was aggravated by the injury in so much as there was trauma in both shoulders at the time of the injury. It appears therefore that, irrespective of the report of Dr. Blunden, the medical evidence, as shown by the report of Dr. Beddoe, was sufficient to support the finding that some disability resulted from an aggravation of pre-existing arthritis. Petitioner asserts that Dr. Beddoe's report was the only competent evidence connecting the applicant's disability with his injury and that said report did not show that the disability was 55½% but that it was one-half of 55½%. That assertion is based upon Dr. Beddoe's answer to an interrogatory, which interrogatory was as follows: "How much of the applicant's present disability is due to pre-existing or independently developing arthritis, as distinguished from the effects of his injury of April 28, 1945?" His answer was: "About 50%." It argues in effect that the answer meant that 50% of applicant's present disability is due to the normal progress of the pre-existing arthritis and 50% is due to the effects of the injury including the aggravating effect of the injury upon the pre-existing arthritis. The Commission was not required to place that interpretation upon the answer. The question did not mention aggravation of pre-existing arthritis. Since disability which is due to the aggravating effect of an industrial injury upon a pre-existing disease is to be included in determining the full amount of disability due to the injury, the Commission might have interpreted the answer of its assistant medical director to mean that 50% of the disability was due to the aggravation of the pre-existing arthritis as distingbuished from the portion of disability attributable to the injury itself not including such aggravation.

[4] Furthermore, the applicant testified in effect that prior to the injury herein he had not had any shoulder or arm injury, and he had not experienced any discomfort or pain in his upper extremities. The evidence was sufficient to support a finding that the accident aggravated preexisting arthritis which, prior to the accident, was non-symptomatic, non-disabling, and dormant. It would seem that if the arthritis had been symptomatic at the time of the accident, it would have been impossible for the applicant to have performed the difficult acrobatic feat of going hand-over-hand for a distance of 20 feet. There was substantial evidence to support the determination of the Commission that there should be no apportionment of the disability rating.

[5] Respondent Commission makes the contention that this court does not have jurisdiction to review the proceedings in this matter for the alleged reason that the petition for the writ of review was not filed within 30 days after the petition for a rehearing was denied by the Commission on July 13, 1949. It appears from the filing stamp on the petition for the writ of review that the petition was filed on August 13, 1949. This court, upon motion of petitioner, made an order on September 19, 1949, that said petition be filed *nunc pro tunc* as of August 12, 1949. The reason for such order was that the petition actually was deposited for filing in the office of the clerk of this court on August 12, 1949, between 4 p. m. and 5 p. m., and the clerk did not stamp the petition with his filing stamp on that date, but he stamped it the next morning, August 13, 1949. Since, as a matter of fact, the petition was deposited with the clerk for filing on August 12, 1949, it should be deemed that the petition was filed on August 12, 1949, and therefore that it was filed within proper time.

The award is affirmed.

VALLÉE, J., concurs.

SHINN, P. J., concurs in the judgment.

95 Cal.App.2d 503

GHIRINGHELLI v. RIBONI.

Civ. 14027.

District Court of Appeal, First District,
Division 1, California.
Jan. 6, 1950.

Elizabeth Ghiringhelli sued Henry Riboni for an accounting in connection with defendant's management of property owned by the parties as tenants in common.

A judgment was entered for the defendant by the Superior Court of Santa Cruz County, James L. Atteridge, J., and the plaintiff appealed.

The District Court of Appeal, Peters, P. J., affirmed the judgment on ground that judgment of dismissal "with prejudice" entered in prior action for accounting between the same parties precluded plaintiff from litigating the issue again.

1. Judgment 🔑570(6, 16)

A judgment of dismissal entered by consent or stipulation of parties after compromise or settlement of the suit is entered "with prejudice" and is a bar to subsequent suit where dismissal is intended to operate as a retraxit and end the litigation. Code Civ.Proc. § 581, subd. 1.

2. Judgment 🔑570(16)

At common law, for a retraxit to be sufficient to bar bringing of same cause of action thereafter, there had to be an open and voluntary renunciation of the suit in open court, but statute has dispensed with requirement of renunciation in open court. Code Civ.Proc. § 581, subd. 1.

3. Judgment 🔑570(6)

The basic question in case of judgment of dismissal entered by consent or stipulation of parties after compromise or settlement of the suit is whether parties fully understand that the requested dismissal is to be "with prejudice". Code Civ. Proc. § 581, subd. 1.

4. Judgment 🔑570(3)

Where dismissal of prior action for accounting was, at request of plaintiff, "with prejudice", judgment of dismissal in prior action of the accounting issue precluded plaintiff from litigating that issue again. Code Civ.Proc. § 581, subd. 1.

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J. Maxwell Peyser, San Francisco, for appellant.

Wyckoff, Gardner, Parker & Boyle, Watsonville, for respondent.

PETERS, Presiding Justice.

In this action for an accounting, when it appeared from the opening statement of counsel for plaintiff and from two exhibits offered by defendant that the identical issues in this action had been in issue in a prior action between the same parties, and that upon agreement of the parties the former action had been dismissed with prejudice, the trial court entered judgment for defendant. Plaintiff appeals.

Plaintiff makes no attack upon the agreement which was the basis of the dismissal of the prior action, but simply contends that he is entitled to an accounting. He makes no attempt at all to meet the argument that the dismissal with prejudice of the prior accounting suit, is a bar to this action. The appeal lacks merit.

The facts, as disclosed from the pleadings in this action, and from the exhibits introduced into evidence, one of which is the entire file in the prior action, are as follows: The plaintiff and defendant are sister and brother. Before his death, their father, Antonio Riboni, conveyed to them, and to two other children, as tenants in common, certain real property. The complaint in the present action alleges that defendant undertook the full management of the property, collected the rents, paid taxes, made expenditures for repairs, and performed other acts in connection with the property; that the defendant acted as a trustee for the other tenants in common, including plaintiff, and, although requested to do so, has never rendered an accounting to plaintiff. It is then alleged: "That an action was brought in the Superior Court * * * for the County of Santa Cruz, and numbered 20276, for the partition of the property herein set out, wherein said Henry Riboni, * * * was one of the defendants therein, and an accounting was requested of said Henry Riboni of his receipts and expenditures in connection with said properties, during the time of his stewardship, but said defendant failed, refused and neglected to file or render any accounting therefor; that said property was partitioned by the order of said Superior Court, and the action was dismissed on said 15th day of May, 1946 * * *."

The complaint prays that defendant be ordered to file a complete accounting of his stewardship.

The answer admitted that no accounting had ever been filed by defendant, but avers that a full accounting was in fact made to plaintiff each month. As one defense, it alleges the commencement of the prior action and its dismissal with prejudice; that prior to such dismissal the property, with the consent of plaintiff, was sold by the co-owners; that plaintiff has been guilty of laches. The statute of limitations is also set up as a defense.

It appears that the former action for an accounting and for partition was dismissed when an opportunity arose, while that action was pending, for the parties to sell the property which was the subject of the action. An escrow was set up with specific instructions as to how the escrow holder was to distribute rentals and the proceeds of the sale. The parties, so far as the then proceeding for an accounting was concerned, then entered into a stipulation "that at the sole expense of plaintiff above named, without any liability whatever herein upon the defendants for the cost thereof, plaintiff may employ an accountant to audit the accounts and records of defendant Henry Riboni covering collection of rentals and disbursement thereof in connection with the property which is the subject of the above entitled cause."

The prior action was dismissed, with prejudice, by an order filed May 29, 1946, pursuant to the request signed by plaintiff's counsel, reading as follows:

> "You are hereby authorized and directed to enter dismissal of the above entitled ac-

tion as against the above named defendants in said action with prejudice.

"Dated: May 15 1946

"J Maxwell Peyser
"Attorney for Plaintiff"

When these facts were admitted by all concerned in the present proceeding the trial court ordered judgment for the defendant. Findings of fact and conclusions of law were waived by stipulation, but it clearly appears from the reporter's transcript that the trial court based its present judgment on the dismissal with prejudice of the prior accounting action, holding that such a dismissal wiped out every issue involved in that action, and was tantamount to a judgment on the request for an accounting, since no question of fraud or undue influence in obtaining the agreement was raised or alleged.

[1] The position taken by the trial court was clearly correct. The compromise agreement made while the first action was pending has the legal effect of a judgment in determining the rights of the parties. Lamb v. Herndon, 97 Cal.App. 193, 275 P. 503; Silver v. Shemanski, 89 Cal.App.2d 520, 201 P.2d 418. The present case falls squarely within the rule stated in Goddard v. Security Title Ins. & Guar. Co., 14 Cal. 2d 47, 55, 92 P.2d 804, 808: "Other cases are concerned with dismissals by consent or stipulation of the parties, after compromise or settlement of the suit, where the dismissal is intended to operate as a *retraxit* and end the litigation. In such cases the judgment of dismissal is entered 'with prejudice' and is of course a bar to a subsequent suit. [Cases cited.]"

[2-4] At common law for a *retraxit* to be sufficient to bar the bringing of the same cause of action thereafter, there had to be an open and voluntary renunciation of the suit in open court. In this state the statutory method of dismissal provided in section 581, Subd. 1, of the Code of Civil Procedure, which was followed in this case, dispenses with the requirement of renunciation in open court, but a dismissal under that section has the same legal effect as a common law *retraxit*. In re Estate of Cook, 205 Cal. 581, 271 P. 1083; Merritt v. Campbell, 47 Cal. 542. The basic question in such cases under the statute is whether or not the parties fully understand that the requested dismissal is to be "with prejudice." Here the dismissal was, at the request of plaintiff, made "with prejudice." That is determinative of the accounting issue, and precludes plaintiff from litigating that issue again. Breznikar v. T. J. Topper Co., 23 Cal.App.2d 298, 72 P.2d 895; Crossman v. Davis, 79 Cal. 603, 21 P. 963; Lamb v. Herndon, 97 Cal.App. 193, 275 P. 503; see, also, 2 Freeman on Judgments, p. 1596, § 757; 2 A.L.R.2d 514, 567.

The judgment is affirmed.

WARD and BRAY, JJ., concur.

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95 Cal.App.2d 357

HALLORAN et al. v. ISAACSON et al.

ISACKSON v. HALLORAN et al.

Civ. 16814.

District Court of Appeal, Second District, Division 1, California.

Dec. 28, 1949.

Daniel Halloran and others sued George Victor Isaacson, also known as George V. Isackson and another to impress a trust on one-half of certain realty, wherein George V. Isackson filed a cross-complaint.

The Superior Court of Los Angeles County, Carl A. Stutsman, J., rendered judgment for the plaintiffs, and defendants and cross-complainant appealed.

The District Court of Appeal, White, P. J., affirmed the judgment and held that the evidence sustained a finding that the certain realty was the separate property of a deceased wife, that probate court order distributing realty to defendant as community property of him and his deceased wife was obtained by extrinsic fraud and could therefore set aside and that the evidence sustained a finding that the condition on which a life estate in realty in favor of plaintiffs was orally created, was not breached.

1. Husband and wife 🔑249

Property may be shown to be community regardless of manner in which it is held.

2. Husband and wife 🔑264

Testimony that realty conveyed to wife by husband was not intended as gift but that parties were to continue to regard it as community property would not require a finding in accordance with testimony so as to entitle husband to all of property on death of wife. Civ.Code, § 164.

3. Husband and wife 🔑262(1), 264

Where husband conveyed realty to wife stating in deed that it was to be her sole and separate property, presumption under statute was established that realty was her separate property and trial court had to determine whether evidence offered to overthrow presumption had sufficient weight to effect that purpose so as to entitle husband to all of property on death of wife. Civ.Code, § 164.

4. Evidence 🔑87

A presumption is "evidence" and is sufficient to support a verdict of a jury or a finding of court unless overcome by satisfactory evidence.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Evidence".

5. Appeal and error 🔑1010(1)
Evidence 🔑87

Where presumption is not controverted, trial court is bound to follow it, and whether it is so controverted is a question of fact for trial court and conclusion of that tribunal is conclusive unless it is manifestly without sufficient support in evidence.

6. Husband and wife 🔑264

Where title to realty is taken in name of wife, testimony of husband that he did not intend to make a gift of his separate property or his interest in community is sufficient, if believed by trial court, to overcome presumption that property is not part of community. Civ.Code, § 164.

7. Appeal and error 🔑930(1)

Unless action of trial court or jury in repudiating testimony given before it appears to be inherently erroneous or on its face as involving an arbitrary disregard of such testimony, an appellate court must presume that on sufficient reasons testimony was deemed to be wanting in verity and therefore without probative or evidentiary force or value.

8. Evidence 🔑590

Fact that witness who gives uncontradicted testimony is directly interested in outcome of litigation is a circumstance to be considered in weighing testimony.

9. Husband and wife 🔑264

Where husband conveyed realty to wife by deed reciting that realty was her sole and separate property and part of purchase price of realty was represented by deed of trust executed by wife alone, burden was on husband claiming all of property on death of wife to overcome presumption that realty was separate property of wife. Civ.Code, § 164.

10. Appeal and error 🔑989

Power of District Court of Appeal, when a finding is attacked as unsupported by evidence, begins and ends with a determination whether there is any substantial evidence to support conclusion of trier of fact.

11. Husband and wife 🔑264

Evidence sustained finding that realty was separate property of deceased wife by reason of husband's giving her a deed reciting that it was to be her sole and separate property so that surviving husband was not entitled to realty as community property of himself and deceased wife. Civ.Code, § 164.

12. Judgment 🔑443(1)

Where unsuccessful party is prevented from exhibiting fully his case by fraud practiced on him by his opponent, as by keeping him away from court, a suit may be maintained to set aside former judgment and open case for new and fair hearing.

13. Judgment ⚿461(5)

Evidence sustained finding that by concealment and misrepresentation surviving husband misled probate court in believing that realty in name of deceased wife was part of community so as to enter a decree of distribution in accordance with that belief and that husband lulled parents of wife into security and effectively prevented them from protecting their interests in the estate of their daughter so that action to set aside decree of distribution and to open case for a fair hearing could be maintained by parents.

14. Frauds, statute of ⚿129(4, 6)

An oral transfer of an estate in land may be made effectual by taking possession of land and performance by grantee of acts in reliance on the grant.

15. Life estates ⚿4

Evidence sustained finding that plaintiffs did not cease making a home for defendant so that life estate in plaintiffs created orally did not terminate on ground that plaintiffs breached condition on which estate was created.

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Sturzenacker & Isenberg, Carl B. Sturzenacker and Albert E. Isenberg, Hollywood, for appellants.

Eberhard & Zeigler, Caroline R. Kellogg, Los Angeles, for respondents.

WHITE, Presiding Justice.

Peggy Halloran Isaacson (hereinafter sometimes referred to as Peggy Halloran) died intestate April 26, 1944, leaving surviving her husband, George V. Isaacson, one of the appellants herein, her parents, Mr. and Mrs. Daniel Halloran, and her sister, Louise Halloran Bravender. At the time of her death a parcel of real property, hereinafter referred to as the "Alexandria Street Property", stood in the name of the decedent, title thereto having been taken by deed to "Peggy Halloran" in March, 1942. In April, 1942, there was executed, delivered and recorded a deed of the property from George V. Isaacson to "Peggy Halloran, wife of grantor, as her sole and separate property". In the probate of the estate of his wife, appellant Isaacson acted as administrator. A decree of distribution was entered distributing the Alexandria Street property to appellant Isaacson as community property of him and his deceased wife. Thereafter the present action was commenced by the parents and sister of decedent wife, seeking among other things to have it declared that the property in question was the separate property of decedent and to impress a trust upon one-half thereof in favor of the plaintiffs. The trial court, hearing the cause without a jury, found that the property was decedent's separate property at the time of her death and adjudged that the husband held an undivided one-half interest in trust for the parents of decedent and should execute a deed conveying such interest to the parents, and further adjudged that the one-half interest held by the husband was "subject to the right of plaintiffs Agnes B. Halloran and Daniel Halloran to live in said premises and make their homes therein so long as said Agnes B. Halloran or Daniel Halloran shall continue to live; that said defendant is also entitled to make his home therein."

Appellants contend (1) "That the court erred in granting plaintiffs Halloran a life estate which was not supported by the evidence"; (2) "The court erred in its decision in finding the property to be separate property of deceased by reason of the deceased's husband giving her a deed"; (3) "The court erred in attempting to set aside a probate court order on the grounds of extrinsic fraud." The two last contentions will be considered first.

Appellants' argument under point 2 is, in effect, that the evidence is insufficient to support the finding that the property in question became the separate property of decedent by virtue of the deed to her from her husband in April, 1942. Appellants in their brief refer to testimony given by several persons who were present at the time the deed from Mr. Isaacson to his wife was drawn and executed, which testimony, in substance was to the effect that it was the expressed intent of both grantor and grantee merely "to show that Peggy Halloran was the owner of record in case (Mr.

Isaacson) should get into business." As stated by one witness, Peggy Halloran said, "It is just putting the title of the property in my name if George goes into business or bids on some of these contracts he is always talking about. * * * George, I am your lawyer as well as your wife. You know this is the way we handle our property. * * * Well, in case anything did happen to me, why everybody here knows the circumstances of this deed being made. After all, we have to protect this property because it is this property that is going to keep us in our old age." Another witness testified that Peggy Halloran said that the property had to be handled that way in order to protect "George" from his own "financial faults." Emphasis is also placed on the deliberate omission to include in the deed a clause, assertedly required by title companies, to the effect that title by agreement of the parties was vested absolutely in the grantee as her sole and separate property. The witnesses also testified, in effect, that Peggy Halloran stated on this occasion, "This is our community property."

[1, 2] The authorities cited do not support the position of appellants, which amounts to no more than a contention that the trial court was bound to find in accordance with the testimony of Mr. Isaacson, and other witnesses that although the property was placed in his wife's name it was their intent to treat it as community property and that he did not intend to make a gift. The cases of Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905; Stephenson v. Brand, 122 Cal.App. 543, 10 P.2d 476; Henry v. Hibernia Savings & Loan, 5 Cal.App.2d 141, 42 P.2d 395; and Estate of Helm, 6 Cal.App.2d 752, 45 P.2d 250; and Wilson v. United States, 9 Cir., 100 F.2d 552, cited by appellants, stand simply for the rule, as also set forth in the cases hereinafter referred to, in substance, that property may be shown to be community regardless of the manner in which it was held—that it may be shown that it was acquired with community funds, and that the presumption, arising under section 164 of the Civil Code and the authorities construing it, that property placed in the wife's name although acquired with community funds is her separate property and a gift from the husband, may be rebutted by testimony of the husband that he did not intend such a gift or that the parties had agreed that the property should remain community regardless of the manner in which it was held. But the trial court was not required to find in accordance with the testimony of any particular witness or any number of witnesses any more than it was required to find in accordance with the presumption. The language in Chamberlain v. Chamberlain, 2 Cal.App.2d 684, 687, 38 P.2d 790, 791, quoted with approval in Wilson v. United States, supra, relied upon by appellants, is here pertinent:

"Appellant's testimony was introduced to rebut the legal effect of the documentary evidence produced by plaintiff. However, the trial court was not obliged to accept the explanation offered by appellant and to decide that it overcame the legal effect of the deeds and of the agreement for the sale of the property. Respondent's documentary evidence created a presumption that the legal title to the property was in respondent and appellant as joint tenants in accordance with the plain language of the deeds. Appellant sought to overcome this presumption by the testimony which he himself offered. *It remained for the trier of facts to decide whether the proof offered by appellant was sufficient to overthrow the presumption.* * * * "It is obvious that the principle which is here applicable is the very common principle which requires that a finding of a trial court attacked for lack of evidentiary support must be upheld if the evidence respecting the facts specified in the finding is conflicting. * * *" (Emphasis added.)

[3-5] As pointed out in respondents' brief, the deed from Mr. Isaacson to his wife, in her maiden name, "as her sole and separate property" established a presumption under Civil Code section 164 that the property was her separate property. That presumption was itself evidence, and it was for the trial court to determine whether the evidence offered to overthrow the presumption had sufficient weight to effect that purpose. Pabst v. Shearer, 172 Cal. 239, 242, 156 P. 466. "A presumption is evi-

dence and is sufficient to support a verdict of a jury or a finding of the court, unless overcome by satisfactory evidence." Steward v. Paige, 90 Cal.App.2d 820, 824, 203 P. 2d 858, 861. "It is only where the presumption is not controverted that the court is bound to follow it. Whether or not it is so controverted is a question of fact for the trial court, and the conclusion of that tribunal is conclusive upon an appellate court, unless it is manifestly without sufficient support in the evidence." Stephenson v. Brand, supra, 122 Cal.App. 543, 10 P.2d 476.

[6] As heretofore stated, the authorities simply hold that where title is taken in the name of the wife, the testimony of the husband that he did not intend to make a gift of his separate property or of his interest in the community is sufficient, *if believed by the court,* to overcome the presumption declared by section 164 of the Civil Code. Whitaker v. Whitaker, 137 Cal.App. 396, 399, 30 P.2d 538, 540.

[7, 8] The argument that the court was bound to accept the testimony of the husband and his witnesses is answered by a quotation from the case just cited: "The rule that the uncontradicted testimony of a witness cannot be disregarded is subject to the limitation that the trial court or jury may discard such testimony when the surrounding circumstances of the case afford probable justification for such action. * * 'Unless the action of a trial court or jury in repudiating testimony given before it appears to be inherently erroneous or upon its face as involving an arbitrary disregard of such testimony, an appeal court must assume and, indeed, presume, that upon sufficient reasons the testimony was deemed to be wanting in verity, and therefore without probative or evidentiary force or value.' Pacific Coast Dried Fruit Co. v. Sheriffs, 31 Cal.App. 131, 137, 159 P. 986, 989.

"The fact that the witness who gave the uncontradicted testimony is directly interested in the outcome of the litigation is a circumstance important in weighing the testimony given."

See also Barham v. Khoury, 78 Cal.App. 2d 204, 177 P.2d 579, and Broderick v. Koehler, 92 Cal.App.2d 813, 207 P.2d 1070.

[9] In the present case appellants' witnesses were interested in the outcome. The appellant was endeavoring to overcome a presumption, arising from the deed from him to his wife, that the property was the separate property of his wife. The presumption, although disputable, was itself evidence, and it was for the trial court to say whether the evidence offered to overthrow it had, under all the surrounding facts and circumstances, sufficient weight for that purpose, Pabst v. Shearer, supra. Not only was the property taken in the wife's name when it was acquired, but this action was followed by a deed from the husband to the wife "as her sole and separate property." Part of the purchase price was represented by a deed of trust executed by the wife alone. The burden was upon the husband to overcome the presumption. Hogevoll v. Hogevoll, 59 Cal.App.2d 188, 196, 138 P.2d 693; Estate of Walsh, 66 Cal.App.2d 704, 707, 152 P.2d 750.

[10, 11] No citation of authority is necessary in support of the established rule that the power of this court, when a finding is attacked as unsupported by the evidence, begins and ends with a determination whether there is any substantial evidence to support the conclusion of the trier of fact. That such substantial evidence exists in the case at bar is manifest. Therefore the finding of the trial court that the property was the separate property of Peggy Halloran Isaacson at the time of her death cannot be disturbed.

Appellants' next contention, that there was no extrinsic fraud in securing the decree of distribution, is without merit. Appellant Isaacson represented to the probate court that the property was community. He secured the signatures of Mr. and Mrs. Halloran to a statement acknowledging that the property was community and consenting to its distribution to the surviving husband, and presented it to the probate court to be acted upon. The trial court's findings in this connection are as follows: That Mr. and Mrs. Halloran were aged and enfeebled and in a declining state of health, and in such physical and mental condition as to render them "susceptible to artful and designing persons"; that they were without experience in legal matters, leaving all such matters to their daughter, Peggy Halloran, who was an active and practicing attorney; that they had no knowledge of the deed from Mr. Isaacson to Peggy Halloran until after the commencement of this action. The court further found:

"That at numerous times and on numerous occasions after his marriage to said Peggy Halloran Isaacson, defendant George Victor Isaacson represented to plaintiffs that he had great admiration, respect and affection toward plaintiffs Daniel Halloran and Agnes B. Halloran, and that he had assumed and always would assume a responsibility for the welfare of plaintiffs Daniel Halloran and Agnes B. Halloran, as a loving son; that prior to August 23, 1945, he had shown an honorable, honest and sympathetic nature to plaintiffs; that said defendant stated to plaintiffs that he would act as administrator of the estate of said Peggy Halloran Isaacson and that he would employ Cecil Betz Davis, an attorney, to act as attorney for the estate and to conduct the probate proceedings, and that he would employ said Cecil Betz Davis to represent plaintiff Agnes B. Halloran in proceedings to terminate the joint tenancy of said plaintiff Agnes B. Halloran and said Peggy Halloran Isaacson in certain real property located at 6201 West Fifth Street, Los Angeles; that plaintiff believed all of said representations of defendant and relied upon them; that by reason of the relationship between plaintiffs and defendant, defendant occupied a confidential relationship toward plaintiffs, and that plaintiffs trusted defendant and believed all of such statements and representations of said defendant to be true and relied upon said defendant to protect their interests, and by reason of these facts did not consult counsel to look after their interests and made no investigation of the condition of said estate until about the month of May, 1946.

"That on or about August 23, 1945, while plaintiffs Louise Halloran Bravender and Harold R. Bravender were away from the City of Los Angeles, defendant George Victor Isaacson came to plaintiffs Daniel Halloran and Agnes B. Halloran in the home at 500 South Alexandria Street in said City, which plaintiffs and defendant were then occupying as their joint home, and presented to said plaintiffs Daniel Halloran and Agnes B. Halloran a document, and stated to them that said document had to be signed in the probate proceedings in the estate of Peggy Halloran Isaacson; that defendant represented to plaintiff Agnes B. Halloran that said document would not change anything and that the facts therein stated were true; that plaintiffs Daniel Halloran and Agnes B. Halloran signed said document without reading it; that plaintiffs believed such representations to be true and believed that said document would not change nor affect the condition of the title to the premises hereinabove described and relied upon such representations and trusted defendant, and by reason of such belief and reliance on said representations signed said document, on said August 23, 1945; that all of said representations were false and that defendant knew at the time of making said representations that they were false; that defendant made said representations with the intent that they should be relied upon * * *; that said document stated that said property * * * was the community property of Peggy Halloran Isaacson, also known as Peggy Halloran, deceased, and George Victor Isaacson, her husband; that said statement is, and was untrue, * * * defendant George Victor Isaacson knew that said statement was untrue.

"That said document, together with the First and Final Account and Petition for Distribution of said estate, was filed by said defendant George Victor Isaacson in said probate proceeding * * * and a decree made distributing said real property * * * to said defendant * *."

"That * * * said property * * * was the separate property of said Peggy Halloran Isaacson; that the Decree of Distribution entered in said Estate * * * was based upon and entered by reason of said false statement * * * that the

Decree of Distribution based upon said statement was procured by defendant and was made and entered wholly as the result of extrinsic fraud practiced by said defendant upon said plaintiffs and upon the court * * *."

It further appears that a little over six months after the entry of the decree of distribution, appellant Isaacson caused to be served on respondents a notice purporting to terminate an alleged tenancy at will of plaintiffs in the real property and thereafter commenced an action in unlawful detainer seeking their eviction.

Appellants' argument on the evidence amounts to no more than a claim that the trial court drew erroneous inferences from the testimony. Viewing the evidence, however, as we must, in the light most favorable to the prevailing parties, we find evidence to support the conclusion that by concealment and misrepresentation defendant Isaacson misled the probate court; lulled the plaintiffs into security and effectively prevented them from protecting their interests in the estate of their daughter. He concealed from the parents the fact that he had deeded the property to the daughter and represented that the document they were signing "would not change anything." His relationship with them was one of trust and confidence.

[12] Among the cases relied on by appellant is Bacon v. Bacon, 150 Cal. 477, 89 P. 317. It is there said, 150 Cal. at page 490, 89 P. at page 322:

"The general rule as to what constitutes extrinsic fraud or mistake is clearly stated by the United States Supreme Court in United States v. Throckmorton, 98 U.S. [61], 65, 25 L.Ed. 93. After stating the general rule that a bill in equity will not lie to set aside a judgment obtained by means of perjured testimony, or forged documents, introduced in evidence in support of a contested issue of fact, that court says: 'But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to the suit, there was, in fact, *no adversary trial or decision of the issue in the case.* Where the unsuccessful party has been *prevented from exhibiting fully his case* by fraud or deception practiced upon him by his opponent, as by keeping him away from court; * * * these, and *similar cases which show that there never has been a real contest at the trial or hearing of the case,* are reasons for which a new suit may be sustained to set aside the former judgment or decree and open the case for a new and fair hearing.' (The italics are ours.)"

[13] Certainly the facts as found by the court come within the rules above set forth. There was here no adversary trial or decision because the Hallorans, relying upon appellant Isaacson to take care of matters for them, were prevented from exhibiting fully their case before the probate court. The essence of the matter is that because of the relationship of trust and confidence between the parties, appellant Isaacson was able, through misrepresentation and concealment, to secure a decree vesting sole title in him.

Appellants' arguments throughout their briefs, as heretofore noted, amount to no more than a contention that the trial court drew erroneous inferences and that this court should accept appellants' interpretation of the evidence. Under the rule hereinbefore referred to governing the power of an appellate court where the evidence is in conflict, it is established law that when two or more inferences can reasonably be deduced from the facts, a reviewing court is not authorized to substitute its deductions for those of the trier of fact. This rule is applicable when it is sought by testimony to overcome a presumption. Thompson v. Davis, 172 Cal. 491, 493, 157 P. 595; Smellie v. Southern Pacific Co., 212 Cal. 540, 549, 299 P. 529; Lieber v. Rigby, 34 Cal.App.2d 582, 584, 94 P.2d 49.

Appellants' contention "that the life estate given to plaintiffs, Daniel Halloran and Agnes B. Halloran, was not supported by any testimony" is likewise based upon their own interpretation of the evidence before the trial court. It was found, in substance, that after the death of his wife, appellant told respondents that he was in a state of profound grief and could find relief only by being in the presence and company of respondents; that he owed a great debt to his deceased wife because of the comfort, happiness and assistance she had given him and that the only way he could repay this debt was by aiding her family, respondents herein, as Peggy Halloran had intended doing had she lived; that she had planned and intended to have respondents sell their own home and come to live with her and appellant in the Alexandria Street house and make their home there permanently; that the Alexandria Street property would be in probate proceedings for many months during which time it could not be sold, while the Hallorans' property could be sold; that appellant advised said respondents to sell their property and move into the Alexandria Street property and make their home with him, and represented that if they would do so they could continue to live there during the lives of respondents Daniel and Agnes B. Halloran and Louise Halloran Bravender (their daughter), or any of them. There was testimony that appellant further represented to respondents that it would be difficult for him to meet the expenses of maintaining the Alexandria Street property alone and that he would need the financial assistance and personal help of respondents to keep the property and maintain it as a home and that appellant and respondents would use the Alexandria Street property as their home throughout the lifetime of respondents, other than Harold Bravender. That respondents believed such representations and in reliance thereon sold their property and moved into the Alexandria Street property and at all times since have performed their obligations with respect thereto.

[14, 15] Appellant urges that when "they (the Hallorans) ceased making a home for the defendant, as appears from the testimony, the tenancy ceased and a 30-day notice of termination of that tenancy was in order." The testimony which the court believed, however, was the testimony that Hallorans did not cease making a home, but that appellant voluntarily absented himself therefrom most of the time. The case cited by appellant, Bekins v. Smith, 37 Cal.App. 222, 174 P. 96, to the effect that a life estate created orally and based on a condition terminates when the condition is breached, is also authority for the statement that an oral transfer of an estate in land may be made effectual by taking possession of and performance by the grantee of acts in reliance on the grant. This is precisely the situation presented in the instant case. The argument that the Hallorans failed to live up to their end of the bargain is answered by the fact that upon conflicting evidence the court found against appellants' contentions.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

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95 Cal.App.2d 414

WEESNER v. LEASED TRANSPORTATION et al.

Civ. 17153.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1949.

Wendell W. Weesner brought action against Leased Transportation, a partnership, and others for an accounting and to obtain commissions allegedly due under an oral brokerage contract.

The Superior Court of Los Angeles County, Ott J. Emme, J., rendered a judgment for the plaintiff, and the defendants appealed.

The District Court of Appeal, Wilson, J., affirmed the judgment and held that evidence sustained findings that defendants agreed to pay plaintiff a commission on all rentals for use of defendants' trucks and automotive equipment where contracts were solicited or procured by plaintiff, that recovery of commissions was not barred by accord and satisfaction, and that certain evidence was properly admitted.

1. Brokers 🔑86(1)

Evidence sustained finding that owners of trucks and automotive equipment agreed to pay broker a commission on all rentals and receipts received by owners from all users contacted, solicited, or procured by broker for owners.

2. Brokers 🔑86(4)

In action for an accounting and for commissions allegedly due under oral brokerage contract, evidence sustained finding that plaintiff was the procuring or effective cause of leasing by defendants of automotive equipment and trucks and that plaintiff was therefore entitled to commissions on gross rentals received by defendants.

3. Appeal and error 🔑994(3), 1012(1)

The weight of testimony and credibility of witnesses are matters for trial court as trier of the facts. Code Civ.Proc. § 1847.

4. Brokers 🔑49(1)

Where there was no requirement in oral brokerage contract that plaintiff as broker obtain a binding contract for leasing of defendants' trucks and automotive equipment, fact that plaintiff did not obtain a binding contract for lease of trucks and equipment did not preclude recovery of commissions on rentals by plaintiff.

5. Appeal and error 🔑1011(1)

Where evidence was conflicting on question whether plaintiff, as broker, was procuring cause of lease of defendants' trucks and automotive equipment, conclusion on question was for trial court as trier of facts, and would not be disturbed on appeal.

6. Accord and satisfaction 🔑26(3)

Evidence sustained findings that plaintiff was induced by fraud and deceit of defendants to sign releases and indorse checks reciting that when indorsed they would constitute a receipt for all commissions due and payable to plaintiff, and that therefore releases and endorsements did not constitute an accord and satisfaction which would preclude recovery of brokerage commissions.

7. Accord and satisfaction 🔑26(2)

In action for accounting and for commissions, wherein defendants pleaded that releases and indorsement of checks by plaintiff constituted an accord and satisfaction, court properly admitted evidence as to plaintiff's poor financial condition at time he executed releases, to aid in determination of question whether defendants exerted fraud and undue influence in obtaining releases. Civ.Code, § 1575.

8. Brokers 🔑39

Fact that the government to which trucks and automotive equipment had been leased, exercised its option to purchase trucks and equipment and acquire title by paying difference between rental paid and total reclaiming price, could not deprive broker of his commission from original owners of trucks and equipment, on rentals which had been theretofore received by them for use of trucks and equipment.

9. Appeal and error 🔑66, 782

Interlocutory judgment was not appealable, and purported appeal therefrom would be dismissed.

10. Appeal and error 🔑107, 782

Report of referee on accounting was not appealable, and purported appeal therefrom would be dismissed.

Adams, Duque & Hazeltine, A. Andrew Hauk, William Stinehart, Los Angeles, for appellants.

John L. Huntzinger, Warner I. Praul, Los Angeles, for respondent.

WILSON, Justice.

From a judgment in favor of plaintiff in an action for an accounting and to obtain commissions allegedly due under an oral brokerage contract, defendants appeal. They have also purportedly appealed from the interlocutory judgment and from the report of referee on accounting.

In January, 1941, plaintiff and defendant General Truck Rentals entered into an oral agreement whereby plaintiff was engaged as a full time broker, salesman and contact man; in this capacity his duties were to make contacts with and solicit business from prospective users of trucks and automotive equipment which was to be supplied by defendant; in consideration for plaintiff's services defendant agreed to pay a commission of ten percent of the gross amount of all rentals and receipts for the use of automotive equipment received by defendant from any and all users thereof contacted, solicited or procured by plaintiff. Some months later, when defendant Leased Transportation Service was formed and commenced business, it also entered into an oral agreement with plaintiff the terms of which were the same as the prior contract entered into with General Truck Rentals and embodied the same arrangement for the payment of commissions to plaintiff for services as a broker, salesman and contact man; in October, 1941, both contracts were modified to provide that the commissions thereunder would be divided equally between plaintiff and one Merrill P. Brooks, who was employed by defendants in the same capacity and compensated in the same manner and at the same rate as was plaintiff, so that each would receive a commission of five per cent of the gross rentals and receipts on all future business obtained by either of them; each would continue to receive the full ten per cent commission on the gross rentals received from customers which each had theretofore contacted, solicited or procured for defendants.

Acting in pursuance of the above mentioned contracts plaintiff solicited and procured for defendants various customers to whom they supplied trucks and automotive equipment for use on sundry jobs, most or all of which were government defense projects. In some instances the orders were taken by plaintiff personally and in others they were transmitted directly by the customers to defendants. In either event if plaintiff obtained the account he was credited with the commissions.

In February, 1942, plaintiff was confined in the county jail for reasons which were unrelated to his employment. While he was so confined he wrote defendant L. M. Duntley inquiring as to how much he had coming to him in his final account. In April, 1942, plaintiff wrote Duntley that he had been sentenced to three months and that he would be in the army before the sentence was terminated; that he was surprised to learn his final accounting amounted to only $400. About a week before the 25th of August, 1942, plaintiff went to Duntley's office and made a request for moneys due him on account of commissions, at which time Duntley told him to come back in a week or so and he would "have something figured out." On August 25, 1942, plaintiff called again at Duntley's office and received two checks payable to his order, one drawn by Leased Transportation Service in the amount of $192.12 and the other drawn by General Truck Rentals in the sum of $29.40. Each of these checks bore on the back thereof the notation: "When endorsed this check will constitute a receipt for all commissions due and payable." At the same time plaintiff signed two releases one of which read as follows: "Received of Leased Transportation Service $196.04 for all commissions due and payable to the account of the undersigned: When signed this receipt will constitute a release with Wendell Weesner and Leased Transportation Service, for any and all monies due Wendell Weesner." The other release was identical except it acknowledged receipt of $30.00 and released General Truck Rentals.

Plaintiff entered the U. S. Army on September 9, 1942 and remained in the Service until February 28, 1946. Upon his return to Los Angeles he received information which was the basis for the present action.

The court found that plaintiff in pursuance of his employment solicited business for defendants and as a result of his efforts defendants supplied trucks and automotive equipment to certain specified customers on various jobs and projects; that plaintiff was entitled to commissions on the gross rentals received from such customers for which defendants had failed to account. The court further found that defendants with the intent to deceive and defraud plaintiff and as a means by which to induce him to endorse the checks and sign the releases, concealed from him the fact that from and including January, 1942, the defendants had been leasing automotive equipment to the McNeil Construction Company for use on the Basic Metals and Magnesium Plant project at Las Vegas, Nevada; that defendant General Truck Rentals had billed and was entitled to receive as gross rentals for the use of the equipment a sum in excess of $7,000; that defendant Leased Transportation Service had billed and was entitled to receive as gross rentals and compensation for the use of their equipment a sum in excess of $100,000; that defendants had received payments on account, on which commissions were payable to plaintiff; that plaintiff is entitled to commissions in the amount of ten percent of all gross rentals and receipts obtained by defendants from the leasing of trucks and automotive equipment to the McNeil Construction Company for use on the Basic Metals project; that defendants, also with the intent to deceive and defraud plaintiff and as a means by which to induce him to endorse the checks and sign the releases, represented to him that all commissions to which plaintiff was entitled by virtue of the services rendered by him to defendants were included in those checks; that these representations were false and known to defendants to be false and thereby plaintiff was misled and induced to endorse the checks and sign the releases.

The court further found that during the period from February, 1942, to the time when plaintiff signed the releases and checks he had been for the most part without funds and hard pressed for a means of livelihood; that his indigent and necessitous condition and the state of his business, personal and domestic affairs were fully known to defendants; that they also knew that his departure for service in the U. S. Army was imminent; that knowing of the conditions and that plaintiff was without the means, resources, time or opportunity to investigate or protect and safeguard his interests and rights, defendants submitted the checks and releases and as a condition prerequisite to the payment thereof required his endorsement; that defendants obtained plaintiff's endorsement by taking a grossly oppressive and unfair advantage of his necessities and distress.

In accordance with these findings the court rendered an interlocutory judgment for an accounting and appointed a referee. The report of the referee was approved and adopted by the court and judgment was entered against defendants for the sums ascertained by the referee to be due plaintiff in accordance with the interlocutory judgment.

Defendants contend the evidence is insufficient to support the findings since (1) plaintiff did not perform all his obligations under the terms of the agreement of employment; (2) plaintiff could not possibly have been the procuring cause or effective cause of the leasing of equipment to Defense Plant Corporation (the Basic Metals job); (3) there was an accord and satisfaction between the parties and the evidence was insufficient to establish undue influence or fraud.

Defendants concede the rule to be that the finding of the trial court on conflicting evidence will not be disturbed on appeal. However, they maintain there is no real or substantial conflict in the evidence upon the material issues and the evidence taken as a whole is legally insufficient to sustain the findings or support the judgment for plaintiff.

Both parties are in agreement that plaintiff was employed by defendant L. M. Duntley, the president of General Truck Rentals, as a broker to contact prospective customers for the leasing of their equipment; that it was originally agreed plaintiff was to receive a commission of ten percent on the gross rentals for any equipment leased to customers contacted by him and that the commission arrangement was later modified. It is defendants' contention, however, that in order for plaintiff to be entitled to the commissions it was necessary for him to service the account by inspecting the equipment while it was on the job and making periodic reports; that since the servicing of the account was a vital term of the employment contract, his employment terminated in February, 1942, inasmuch as after that date he could no longer check equipment and make reports while equipment was on a job.

Plaintiff testified that although once in a while he did check the equipment there was no agreement that he should do so; Brooks testified that once he had established contacts on the jobs he received commissions until the end of the job; that if additional equipment was ordered after the initial order he received his commissions on the additional equipment placed on the job; that he checked the equipment "off and on" but stated he did not do any actual work himself. There is nothing in his testimony which would indicate that checking the equipment was a prerequisite to his right to the commissions. L. M. Duntley testified that it made no difference whether plaintiff brought in the order or whether it was mailed in, if they could "tie him into the account" he would be credited with the commissions; that plaintiff's business was making contacts with potential users of equipment; if plaintiff made the original contact, the user was considered his customer; at the time he and plaintiff entered into the employment agreement he told plaintiff that if he brought in an order for trucks which was acceptable to them they would pay him a commission on it; that he told him he would have to service the account.

[1] From the foregoing it is clear that there is substantial evidence to support the finding that defendants agreed to pay plaintiff a commission on all rentals and receipts for the use of automotive equipment received by defendant from any and all users thereof contacted, solicited or procured by plaintiff for defendants. In so far as the requirement that the account be serviced is concerned, there is a conflict in the evidence which conflict the trial court resolved in favor of plaintiff.

Defendants maintain that plaintiff could not possibly have been instrumental in the leasing of equipment to the Defense Plant Corporation or McNeil Construction Company for the Basic Metals job; that plaintiff's claim for commissions on equipment placed on that project is based upon a conversation alleged to have taken place with one John Tremaine when the latter was working for McNeil-Zoss Construction Company on the Linda Vista Housing Project in San Diego, California, in May, 1941; that the conversation could not have taken place as alleged for the reason that no one knew of the Basic Metals job until September, 1941.

Plaintiff testified that he called upon Tremaine sometime in April, 1941, at the Linda Vista housing project; that his purpose in calling upon him was to try to place equipment on that project and he was successful in placing three trucks; that he called upon Tremaine again about a month later in May or June, 1941, in connection with a special order for two small dump trucks; that about a week later he delivered a truck to Tremaine; that he returned to Los Angeles and advised Duntley he had had a long conversation with Tremaine who was "interested in finding out whether or not we could furnish a tremendous amount of equipment to go on a job that he was going on and that the job wouldn't break for quite a little time, meaning a couple of months;" he told Duntley he had informed Tremaine he was quite sure they would be interested but he would rather discuss the matter with Mr. Duntley because the job was of such magnitude that it should be handled through principals and not through some broker; that if it was agreeable to Tremaine he would arrange to bring Duntley to San Diego; Duntley told him he handled it just right and that he would speak to his father about it; the following day Duntley told him to call Tremaine and make arrangements for him to see the latter on Saturday; Duntley accompanied him to San Diego on Saturday and he introduced Duntley to Tremaine; he excused himself and left the room when they started talking; he did not discuss the matter with Duntley immediately afterwards because there were other people around; he discussed it with Duntley later after he returned from Camp Cook; Duntley told him he had been in touch with Tremaine and was going to meet him again; that it looked like the deal was going through. On cross-examination plaintiff testified that Tremaine had told him the deal would probably run into a half million or three quarters of a million dollars, or more; that McNeil Construction Company by whom Tremaine was employed was figuring on a big job in Las Vegas and was interested in getting the equipment lined up; that he thought his conversation with Tremaine and Duntley was in May or June but he was not sure since "there were so many jobs going at once he couldn't place the start of one and the start of another;" it was not until just before plaintiff went into the Army in September, 1942 that he learned the name of the Las Vegas project was "Basic Magnesium."

L. M. Duntley testified that he made a trip to San Diego where he met plaintiff at the Linda Vista project; his purpose in going there was to meet Tremaine; Weesner had intimated that Tremaine was going to be through with the Linda Vista job and was going to another one; that Weesner "wanted me to go down there and meet Tremaine;" Weesner introduced him to Tremaine; he tried to find out where Tremaine was going from Linda Vista when he was through with that job and "Tremaine said what his next connection was going to be;" they discussed the particular job the trucks were on; he had four trucks on the job and it was a comparatively small operation; Tremaine told him that he wanted to see him in Los Angeles sometime; that his job with McNeil-Zoss Construction Company would soon terminate. Duntley testified he did not remember exactly what the conversation was other than they were delivering the trucks and the job was coming to a close; that Tremaine told him at the time that he would probably be going on to another job from there very shortly; he believed he made the trip to San Diego in July or August; the meeting could not have been in April, May or June because the first trucks were not placed on the Linda Vista job until June and it was sometime after that; the meeting could have been in September.

Tremaine testified he did not remember meeting plaintiff but that if he was the man who brought the truck down, then he met him; he did not remember when he first met Duntley; it was sometime toward the end of the job, shortly before he left there; he could not remember whether or not he met him at Linda Vista; he may have seen him there; he saw too many men to remember one person; he was so busy at Linda Vista that no one man impressed him at all, not even Mr. Duntley; he obtained equipment from Duntley for the Linda Vista project at the very tail end of the job; he first learned of the Las Vegas project from Howard Mann, the general manager of the Linda Vista project; Mann called him into his office and asked him if he would be interested in going to Las Vegas; that it was the very latter part of the job; that he thought it was in September, 1941; that he remained on the job until November 11, 1941; that it was about the same period of time that he had the trouble with one of the trucks supplied by Duntley; it was very possible the trouble with the truck might have occurred after the time he talked with Mann; it would have been impossible for him to have any conversation about the Las Vegas project in April, May or June because "nobody ever heard about the job until September, 1941, and it was a very secret thing;" that he called on Duntley in Los Angeles early in the spring of 1942 to see if he had available equipment; that he was "scouting equipment" and contacted suppliers of the San Diego project and all other suppliers of automotive equipment whose names he obtained from lists furnished by the Chamber of Commerce and other lists.

Defendants argue that plaintiff's testimony is not to be believed since he had been convicted of a felony and that the veracity and credibility of the defendants was unimpeached. Furthermore, they assert, plaintiff's only possible link to the Basic Metals project was through Tremaine; that Tremaine had testified he could not have had any conversation regarding that project with plaintiff in May or June because it was unknown before September; that this testimony was uncontroverted and therefore plaintiff could not possibly have been the procuring or effective cause of the leasing of equipment by defendants to the Defense Plant Corporation for use on the Basic Metals job; furthermore that there is no evidence he had secured a binding contract for defendants or brought the lessee and defendants together so that defendants could secure a binding contract.

[2, 3] Plaintiff testified he believed Tremaine spoke to him about the Las Vegas project "along in May"; he was not certain about the date. This was some time after defendants had supplied trucks for the Linda Vista job. Duntley testified the

trucks were placed on that job in June; he discussed the trucks with Tremaine and at that time Tremaine told him the job at Linda Vista was coming to a close. Tremaine testified that he obtained equipment from Duntley toward the end of the Linda Vista job; that the trouble he encountered with Duntley's truck could have occurred after his conversation with Mann in which he learned of the Las Vegas project. Taking the testimony of the three parties as a whole, the discrepancy in the date does not appear to be material. The testimony of plaintiff, much of which is corroborated by Duntley and Tremaine, is sufficient to sustain the finding that plaintiff was the procuring cause or effective cause of the leasing of equipment for the Basic Metals (Magnesium Plant) at Las Vegas, Nevada, and that he was entitled to commissions on the gross rentals received by defendants for the equipment. Evidence of plaintiff's conviction of a felony was introduced for the purpose of impeachment. The weight of testimony and the credibility of witnesses are matters for the trial court. Rothschild v. Davis, 217 Cal. 660, 661, 20 P.2d 329; In re Estate of LeSure, 21 Cal.App.2d 73, 81, 68 P.2d 313; Code of Civ.Proc. § 1847.

[4, 5] Defendants' contention that plaintiff is not entitled to the commissions because he did not obtain a binding contract is untenable. There was no requirement in the agreement between plaintiff and defendants that plaintiff obtain a binding contract. Duntley testified that it made no difference whether plaintiff brought the order in or it was mailed in since he would be credited with commissions if they could "tie him into the account." The court having found that plaintiff was the procuring cause, and the evidence being uncontradicted that defendants supplied automotive equipment to the Basic Metals project, plaintiff is entitled to his commissions. Where the evidence is conflicting, the conclusion as to the procuring cause is one for the trial court and will not be disturbed on appeal. Brea v. McGlashan, 3 Cal.App.2d 454, 465, 39 P.2d 877.

[6] Defendants contend that the releases and checks constituted an accord and satisfaction between the parties and that the evidence is insufficient to sustain the findings that plaintiff was induced to sign the releases and endorse the checks by the fraud and deceit of the defendants. They maintain that there was a bona fide dispute between the parties as to the amount of commissions owing to plaintiff, as evidenced by the exchange of correspondence between the parties while plaintiff was in the county jail; that notwithstanding this dispute plaintiff executed the releases, accepted the checks and cashed them.

Obviously there was no dispute at that time between the parties as to commissions due plaintiff on equipment placed on the Basic Metals project since plaintiff had no knowledge at the time he executed the releases that defendants had been leasing equipment to McNeil Construction Company for use on the Basic Metals job since January, 1942, and that they had billed and were entitled to receive rentals and compensation for that equipment. A review of the entire record discloses ample and substantial evidence with respect to defendants' methods of bookkeeping, their dealings with defendant Gardner and their deceit and undue influence to support the findings of the trial court.

[7] Contrary to defendants' contention, the court did not err in admitting evidence as to plaintiff's financial condition at the time he executed the releases. That evidence was properly before the court for consideration in determining the question of fraud and undue influence. Civ.Code, § 1575; Carr v. Sacramento Clay Products Co., 35 Cal.App. 439, 447, 170 P. 446.

[8] Defendants' assertion that plaintiff is not entitled to commissions on the gross rentals received by them on the equipment which was "reclaimed" or "recaptured" is likewise without merit. It is their contention that in those instances where Defense Plant Corporation exercised the option to acquire title to the equipment defendants were in reality selling automotive equipment; that since re-

spondent was not engaged to sell equipment he was not entitled to any commissions on the revenue and receipts derived from reclaimed equipment. The contracts when originally entered into were leases with an option to purchase. The income for the use of the equipment was carried on the books of defendants as rentals. The fact that the government later exercised its option to purchase the equipment and acquire title by paying the difference between the rental paid and the total reclaiming price could not deprive plaintiff of his commission on rentals which had been theretofore received by defendants for the use of the equipment.

[9, 10] Judgment affirmed. The purported appeals from the interlocutory judgment and from the report of referee on accounting which are nonappealable, are dismissed.

MOORE, P. J., and McCOMB, J., concur.

95 Cal.App.2d 425

PEOPLE v. GEORGE.

Cr. 2618.

District Court of Appeal, First District, Division 1, California.

Dec. 30, 1949.

Hearing Denied Jan. 26, 1950.

Grover C. George was charged with the violation of a statute penalizing the occupation of a room with paraphernalia for the recording or registering of bets, or the recording or registering of bets or the acceptance of bets upon the purported result of the contest of speed between beasts, and from an order of the Superior Court in and for the City and County of San Francisco, Edward P. Murphy, J., granting the motion of defendant to set aside the information the people of the State of California appealed.

The District Court of Appeal, Ward, J., reversed the order holding that there was sufficient reasonable and probable cause to warrant holding the defendant.

1. Criminal law 🔑238

In a preliminary examination, defendant need not be proven guilty beyond a reasonable doubt and "reasonable or probable cause" required to uphold commitment of defendant exists, if there is sufficient proof to make it reasonable to believe that defendant is guilty of the offense charged. Pen.Code, §§ 872, 995.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Reasonable or Probable Cause".

2. Criminal law 🔑238

"Reasonable or probable cause" required to uphold commitment of a defendant, means such a state of facts as would lead a man of ordinary caution to believe, and conscientiously entertain a strong suspicion of the guilt of defendant and may exist although there may be room for some doubt. Pen.Code, §§ 872, 995.

3. Criminal law 🔑238

Where preliminary examination disclosed that defendant occupied a space in the room with paraphernalia to record and register bets and there was proof of recording or registering of bets by defendant and defendant accepted the bet upon a purported contest of speed between beasts there was "reasonable and probable cause" to uphold a commitment of defendant upon preliminary examination. Pen.Code §§ 337a, subds. 2, 6.

4. Gaming 🔑73, 75(1)

The statute penalizing one who occupies a room with paraphernalia to record or register any bets, or records or registers any bets, or accepts any bets upon purported result of any contest of speed between beasts, does not require that defendant own or have any interest in the premises where the transaction takes place to support a violation of the statute. Pen. Code, § 337a, subds. 2, 4, 6.

Fred N. Howser, Attorney General, Clarence A. Linn, Deputy Attorney General, for appellant.

Hallinan, MacInnis & Zamloch, James Martin MacInnis, San Francisco, for respondent.

WARD, Justice.

This is an appeal by The People from an order of the superior court granting a motion of the defendant to set aside the information charging defendant with violating section 337a, subdivisions 2, 4 and 6 of the Penal Code. Defendant had previously been held to answer by a committing magistrate upon the "production of satisfactory testimony * * * that there is reasonable and probable cause to believe the defendant * * * guilty thereof * * *."

Section 337a provides in substance that every person "who * * * occupied, for any period of time whatsoever, any room * * * with a book or books, paper or papers * * * or paraphernalia, for the purpose of recording or registering any bet" (subd. 2) or "records, or registers any bet" (subd. 4) or "accepts any bet" upon the "purported result" of a contest of "speed * * * between * * * beasts" (subd. 6) is punishable as the section designates. "This section shall apply * * * to every person or persons who may do in a single instance any one of the acts specified * * *."

A police officer testified that he first approached defendant on March 25, 1949, standing in the doorway of a cigar store in Belden Place, San Francisco, at which store certain transactions thereafter took place culminating in the offenses charged in the information. Defendant was then in the company of a woman and a man, the latter being recognized by the officer as the bartender from the premises next door to the cigar store. The officer said to defendant, "Give me $2 on Pea Soup on the eighth to win." Defendant looked at the officer, then at the bartender, who made an affirmative nod, whereupon the officer gave defendant two one-dollar bills. To defendant's query "What initials?" the officer replied by stating his own initials, "P. L." The officer testified that he next saw defendant on March 29, 1949, the date mentioned in the information; that he went into the cigar store and found defendant behind the counter and the bartender standing on the customer's side of the counter. The officer laid two one-dollar bills on the counter and asked defendant "to give [him] two dollars on 'Out of the Blue' in the sixth to win." Defendant looked at the officer, then at the bartender, who nodded his head in the same manner as on the previous occasion. Also, as on the prior occasion, defendant asked the officer for his initials, to which he replied as before. The witness further testified that the serial numbers of the two one-dollar bills he had placed on the counter had been previously recorded in the presence of the sergeant of police. The officer then left the premises. On cross-examination the witness testified that no one touched the money in his presence, and that he "turned around to the bartender and had some conversation with him and paid no attention to what the defendant did." The conversation covered "what horses he [the bartender] had bets on."

Within a few minutes following the occurrence just related, a sergeant of police accompanied by another police officer entered the cigar store and found defendant behind the cigar counter and alone in the premises. The sergeant testified that he went behind the counter to question defendant and saw a quantity of currency lying on top of the cash register, and that defendant opened the register and placed the currency inside the drawer on top of other currency. The sergeant thereupon ordered defendant to open the register and to permit him to examine the pile of currency, which he did, and found therein the two marked one-dollar bills. He testified that he then produced his book containing the previously recorded serial numbers and requested defendant to compare the numbers on the bills with those shown in the book, which defendant did "and they did so compare." For the purpose of the record the two serial numbers were recited. Defendant was asked where he had obtained the marked bills and replied that he "had received them from the bartender next door." As to further conversation had with defendant on that occasion, the sergeant testified: "I told him that he was booking there, and he denied it; and he said there was no book being made on the premises, so I proceeded to make a search of the premises to see if there were any bookmaking paraphernalia on the premises." The superior court trial judge ruled that the witness was qualified as an expert to testify as to certain documents, records and paraphernalia generally used by bookmakers or pool sellers in the area within which defendant was arrested. The initials "P. L." or the purported name of the horse, "Out of the Blue," did not appear on any of the papers introduced in evidence, but the sergeant's testimony in this connection was as follows: "I found a couple of markers on one of the back bar drawers. * * *

"Q. At this time I show you two sheets of white paper, on one sheet appears certain numbers and certain letters, the first sheet I have in my hand has the following numbers and letters. There is a 6 and another number that looks like a 6, and a period between it, and a F, and then the word 'Bell Rey,' and under that are the numerals 2-2-2. Then there is a long line in pencil, and below that is the number 7, and it looks like a 6 or a G; the letter F; and the two words 'Love' and 'Story,' and after them appear the numbers 2, 2, 2. There are certain other additional letters, and the numerals on that same sheet; and on the second sheet, also white and the same dimensions as the previous sheet, it appears to be the same dimensions as the previous sheet, there is the word 'Sweet-Hop' and below those two words are the numbers 3 and ½, 2 and ½, and 1 and ½. I show you these and ask you if these are the sheets of paper which you previously described as having been found in these particular premises on this particular day? A. Yes. * * * They were found on the drawer, what I call the back bar drawer; that would be the back counter of the cigar store.

"Q. Now, in your opinion, what do those two pieces of paper represent? * * * [A.] Those are the betting markers. * * *

"Q. Are they a part of the paraphernalia used by bookmakers and pool sellers in the City and County of San Francisco? A. That is right. * * *

"Q. I show you what purports to be a pad of yellow paper, about an inch and a half in width and approximately four inches in length, and ask you if that is the pad which you previously described as having been found by you in these particular premises on that date? A. That is so.

"Q. Now, Officer, in your opinion, what does the writing which appears on the pad, on the first sheet of this pad, there appears the number 2 and the words 'Called On,' and below that in the same page, and immediately below it the figure 4 and the words 'My Empire,' and immediately below that is the number 5, together with the words 'Bar Pool.' What does that represent, in your opinion, Officer? A. One of those names, 'My Empire,' is the name of a horse. The other I cannot tell you. * * * My opinion of the name of the horses and the front marking would be the amount of the bets. It is very incomplete in so far as being a betting marker, there is not all the pertinent information on it. * * *

"Q. I show you at this time three sheets of yellow paper, the sheets are approximately 1-½ inches wide and 4 inches long, and on each of the sheets appear certain writings and certain figures; I show you first a sheet on which is, on the first line the number 2 and the words 'Old Union,' and '(7B)', and immediately to their right and above in the upper right hand corner are the numbers 180 with a circle around them, and below those particular numbers and words appear certain other numbers and words in the same manner. Now I also show you two other sheets, on the second sheet the words and numbers are headed up by the words 'All White,' and at the top and immediately under that 'Cousin Ruth,' and there appears to the right of those two words, to be a parentheses and the word or number 2 below are certain other names and numbers, and on this third sheet is the word or words 'Sea Spray,' and to the right of those two words is the word 'Scratched,' and below it is the word or words 'Rude,' it could be 'Roman,' and it could be several other things, 'Rude,' something or other; and the number 2 and certain other writings and numbers on it. Now, in your opinion, what do those three sheets represent? A. Records of bets.

"Q. And as such, are they part of the paraphernalia used by bookmakers and pool sellers in the City and County of San Francisco? A. That is one method that is being used."

In answer to questioning by counsel for defendant, the sergeant's testimony was as follows: "Q. The papers that have just now been shown you by Mr. Stout [counsel for The People], are not, in your opinion, markers? A. Yes, records of bets. * * *

"[Q.] As distinguished from markers? * * * [A.] Yes, that is so. * * *

"[Q.] In other words, they are not markers? * * * [A.] No; those particular pieces of paper are records of bets. A marker is also a record of a bet. There is no distinction between a marker and a record of bets; they are both records of bets."

[1, 2] In People v. Mitchell, 27 Cal.2d 678, at page 681, 166 P.2d 10, 12, the rule with respect to probable cause is stated as follows: "In a preliminary examination it is not necessary that a defendant be proved guilty beyond a reasonable doubt. 'Reasonable or probable cause,' required to uphold the commitment of a defendant (Pen.Code, § 995), exists if there is sufficient proof to make it reasonable to believe that the defendant is guilty of the offense charged. Pen.Code, § 872; * * *." In People v. Nagle, 25 Cal.2d 216, at page 222, 153 P.2d 344, 347, the Supreme Court states: "Section 1487(7) of the Penal Code provides that a party is entitled to discharge upon habeas corpus proceedings where he has 'been committed on a criminal charge without reasonable or probable cause'; 'sufficient cause,' therefore, means no more than that. People v. Putnam, 20 Cal.2d 885, 129 P.2d 367; Cleugh v. Strakosch, 9 Cir., 109 F.2d 330; In re Martinez, 36 Cal.App.2d 687, 98 P.2d 528. 'Reasonable or probable cause' means such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused. 'Reasonable or probable cause' may exist although there may be some room for doubt. In re McCarty, 140 Cal.App. 473, 474, 35 P.2d 568; Ex parte Heacock, 8 Cal.App. 420, 97 P. 77; In re Mesquita, 139 Cal.App. 91, 33 P.2d 459; Ex parte Vice, 5 Cal.App. 153, 89 P. 983. The committing magistrate, with the foregoing evidence before him had no alternative other than to order the defendants held for trial."

[3] The preliminary examination disclosed evidence that defendant occupied a space in a room with books, papers and paraphernalia for the purpose of recording and registering bets (Pen.Code, § 337a, subd. 2); that there was proof of the recording or registering of bets by defendant (subd. 4), and that defendant accepted a bet upon a "purported contest, of * * * speed * * * between * * * beasts" (subd. 6). While the evidence is not identical, but similar, the following are cases that were tried and the evidence therein found sufficient to sustain a conviction: People v. Vertlieb, 22 Cal.2d 193, 137 P.2d 437; People v. Hinkle, 64 Cal.App. 375, 221 P. 693; People v. Gilson, 71 Cal.App.2d 584, 163 P.2d 98; People v. Abraham, 67 Cal.App.2d 425, 154 P.2d 450, and People v. Warnick, 86 Cal.App.2d 900, 195 P.2d 552. In the present case the superior court was called upon to determine only the sufficiency of the evidence presented on the preliminary hearing to meet the test of whether there was reasonable and probable cause to warrant the filing of an information.

[4] It has been suggested that there is no proof that defendant owned or had any interest in the premises wherein the transaction took place. In People v. Jerman, 29 Cal.2d 189, at page 195, 173 P.2d 805, 808, it is stated: "It is quite immaterial whether or not the recorder is the bookmaker or connected with the bookmaker

with whom the bet is placed. Financial interest in the bet is not an element of the crime, and the provisions specifically include one who acts gratuitously."

The order appealed from is reversed.

PETERS, P. J., and BRAY, J., concur.

95 Cal.App.2d 372

PEOPLE v. BRADFORD.

Cr. 4378.

District Court of Appeal, Second District,
Division 1, California.
Dec. 28, 1949.

Harry E. Bradford was convicted of pool-selling and book-making upon result of horse racing by a judgment of the Superior Court of Los Angeles County, Charles W. Fricke, J. From the judgment, and from an order denying a motion for new trial, he appealed.

The District Court of Appeal, White, P. J., dismissed the attempted appeal from the judgment and affirmed the order denying a new trial, holding that the statute under which defendant was convicted was not invalid for uncertainty, that proof of the corpus delicti was sufficient to warrant admission of defendant's admissions, and that the evidence sustained the conviction.

1. Criminal law 🔑13

The statute penalizing "pool-selling" and "bookmaking" is not invalid as vague and uncertain, in view of common understanding of quoted words. Pen.Code, § 337a, subd. 1; U.S.C.A.Const.Amend. 14; Const. art. 1, §§ 1, 13.

2. Criminal law 🔑406(1)

Proof of corpus delicti need not be as conclusive and convincing as is required to support conviction, to warrant reception in evidence of extra-judicial statements of accused, but prima facie proof is sufficient, by circumstances shown in evidence or by inferences drawn from facts established.

3. Criminal law 🔑406(1), 1169(12)

Evidence sufficiently established corpus delicti as to count of information which charged pool-selling and bookmaking as basis for reception in evidence of defendant's extra-judicial admissions, and hence defendant suffered no prejudice from reception of such evidence though other count charged occupancy of gambling premises, of which defendant was acquitted.

4. Criminal law 🔑1159(2)

An appellate tribunal may consider evidence, but not weigh it and can only determine whether on face of evidence sufficient facts could have been found by trier of facts to warrant inference of guilt.

5. Criminal law 🔑260(11), 1159(2)

Unless it clearly appears that upon no hypothesis whatever is there substantial evidence to support trial court's conclusion, verdict of jury or decision of trial judge will not be set aside on ground of insufficiency of evidence.

6. Criminal law 🔑260(11)

If circumstances reasonably support trial court's verdict or decision, appellate court's opinion that such circumstances might also reasonably be reconciled with innocence will not justify interference with trial court's determination.

7. Gaming 🔑98(3)

Evidence sustained conviction of pool-selling and book-making. Pen.Code, § 337a, subds. 1, 2.

Stahlman & Cooper, Grant B. Cooper and Percy V. Hammon, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Kent C. Rogers, Deputy Attorney General, for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County defendant was accused in Count I of a violation of Subdivision 1 of Section 337a of the Penal Code in that he did wilfully and unlawfully engage in pool-selling and bookmaking upon the result and purported result of horse racing. Count II charged a violation of Subdivision 2 of the same code section which denounces as a crime the occupancy of any room or other enclosure of any kind, with books, papers, "or paraphernalia, for the purpose of recording or registering * * * bets."

Following the entry of not guilty pleas to each count of the information the cause proceeded to trial before the court sitting without a jury, resulting in the conviction of defendant of the offense charged in Count I and an acquittal of the crime charged in Count II. Motion for a new trial was denied. This appeal is from the judgment and order denying defendant's motion for a new trial.

At the time fixed for the pronouncement of judgment, proceedings were suspended and defendant was placed on probation. Since no judgment was pronounced the attempted appeal therefrom must be dismissed and the cause decided upon the appeal from the order denying the motion for a new trial.

The factual background which gave rise to this prosecution may be thus epitomized: On January 20, 1949, Joseph A. Smith, a police officer of the city of Los Angeles, observed defendant for more than an hour before the latter was arrested. The defendant was driving a 1940 Ford sedan. He was observed getting out of his vehicle and going into a market. When he emerged therefrom and was re-entering his automobile he placed some long pieces of paper in his inside coat pocket. Following defendant "a little farther" Officer Smith observed him stop his automobile and enter a private residence. When defendant again entered his automobile and started away the officer continued to follow him for a short distance and arrested him. On the front seat beside defendant at the time of his arrest were nine Reporter Scratch Sheets and two Metropolitan Scratch Sheets, which were introduced into evidence as People's Exhibit A. Officer Smith opened the door on the driver's side of the vehicle, told the defendant that Smith and his partner were police officers, pulled back defendant's coat and removed from the inside coat pocket numerous lined papers. One of the papers had the word "Lady" in the lower left-hand corner. These papers were introduced in evidence as People's Exhibit B. In defendant's inside coat pocket and in the glove compartment of the automobile were more lined papers, one of which bore in the lower left-hand corner the inscription "Bill C." These papers were introduced in evidence as People's Exhibit C. At the time of his arrest, defendant had in his shirt pocket a small spiral notebook with writings on the pages thereof, one page of which contained the word "Mac" and the figures "29.00." This notebook was received in evidence as People's Exhibit D.

It was stipulated that Officer Smith was an expert on bookmaking as conducted in the county of Los Angeles.

In answer to a question, "Now, Officer, what papers, books, or paraphernalia are commonly used by bookmakers in Los Angeles county?" Officer Smith testified, "Scratch sheets, betting markers and they may either be on special pieces of papers, called the ABC Betting Markers or on plain pieces of paper, pencils, pens, radios, telephones, scratch sheets, form sheets, rundown sheets, owe sheets, and there are other things, too."

This same witness also testified that bets are commonly recorded in Los Angeles county "* * * by showing either the person's name, the name of the person either placing the bet either the agent or the person placing the bet I should say. In some cases the person who the bet is placed for, the date on which a particular bet is placed, the serial number or the name of a horse, the money, how it is placed on that particular horse, whether to win, place or show and the pay-offs in some cases on particular horses."

After Officer Smith had identified People's Exhibits B and C as "betting markers," the following transpired:

"Q. Now, Officer, would (you) interpret for the Court please, the following signs, symbols and figures as they appear on People's B for Identification? On the top sheet appears 6212620. A. Yes. We find first in the upper left-hand corner the figure 1600 and this is followed by the court's nation B for identification and over in the extreme right corner is the figure 19. The 1600 is in my opinion the number that the person uses when they call in. It is a means for identification instead of using their name they use the number. The 19 indicates that they are wagers on the 19th day of January of 1949. Down in the printed line 1 we find the serial number 621. There are two vacant columns and then the third column there is a 2 which is encircled. In the next column however we find the figure 620. By comparing People's B with A 621 in my opinion indicates a horse by the name of—just a minute, I am checking with the—a horse by the name of Curler running in the eighth race at Fairgrounds on the 19th day of January of 1949. The 2 encircled would commonly indicate that $2.00 was placed on that particular horse to show and it did win and by comparing B with A we find that the horse called Curler did win and paid 6.20 which accounts for the 6.20. Under this we find a blue line and the figure 2. In my opinion that is a 2 which is subtracted from the original 6.20. Down on the bottom we find the name Lady which in my opinion is the agent who these particular people place their wagers through and we find the figure in red L4.20. In other words, the 2 subtracted from the 6.20 would leave the figure 4.20 which the bookmaker pays the party by the name of 1600 on that particular wager.

"Q. And would your answer be the same if I asked you your opinion as to all the other sheets of writings that appear on People's B for identification? A. Yes, at random,—I will check them at random.

"Q. Now, Officer, have you compared People's B for identification with People's A for identification? A. Yes, I have.

"Q. Was that spot check or was that a full complete check? A. That was a random check.

"Q. A spot check? A. Yes, sir.

"Q. What did your spot check reveal, officer? A. They were all wagers on horses running on the 19th day of January, 1949.

"Q. What type of a betting marker is People's B, Officer? A. This is commonly referred to as the professional type or the ABC type.

"Q. And the same holds true for People's C for identification? A. Yes, that is true."

The witness then testified that People's Exhibit C represented bets for days previous to January 19, 1949, and that People's Exhibit D, a notebook, especially the sheet with the word "Mac" on top, was a "bookmaker's owe sheet. It shows the amounts of money that he is either supposed to collect or pay to different customers," and that the names thereon, in the opinion of the witness, referred to "customers."

Over the objection of defendant, "upon the ground there has been no proof of the corpus delicti of either of the offenses charged in the information," Officer Smith was permitted to testify to a conversation he had with defendant as follows: "He said, 'I have been arrested before for bookmaking over in Burbank.' He said, 'I just started making the collections for this bookmaker. I have only been doing it for a short while.' And we had further conversation about impounding his automobile at the time of the arrest which he said, 'Well, leave it on Lankershim Boulevard and I will pick it up later.' That is roughly the substance of the conversation."

Defendant himself did not take the witness stand nor did he offer any evidence in his behalf.

As a first ground of appeal it is earnestly urged by appellant that "the first subdivision of Section 337a of the Penal Code of California providing 'Every person who engages in pool-selling or bookmaking, with or without writing, at any time or place,' by virtue of which this appellant suffered a conviction, is unconstitutional and void."

The Penal Code provision in question reads as follows:

"Every person, 1. Who engages in pool-selling or book-making, with or without writing, at any time or place. * * *

* * * * * *

"Is punishable by imprisonment * * *."

Appellant's attack upon the constitutionality of the quoted section is grounded first, on the claim that it is violative of the fourteenth amendment of the Constitution of the United States which prohibits the abridgment by any state of the privileges or immunities of citizens of the United States, or the deprivation of life, liberty or property of any person without due process of law, or the denial to any person of the equal protection of the laws. Second, that the code provision is in conflict with the declaration of rights set forth in Section 1 of Article I of the Constitution of the state of California. Third, that the code provision is also in conflict with the guarantee set forth in the declaration of rights contained in Section 13 of Article I of the California State Constitution.

Appellant urges that in order to comply with the constitutional requirement of due process the crime must be clearly defined to the end that "all may know in what act or omission the violation of the law consists * * *" and "that a person of ordinary understanding may know therefrom when he is violating its provisions."

[1] It requires no citation of authority in support of the proposition that when a statute is so vague and uncertain that a person of ordinary intelligence can not understand its meaning, it may not be upheld as a valid statute. However, we are persuaded that the subdivision of the code section here under attack can not be strictured as one, the provisions of which are so vague, uncertain, and ambiguous as to render it unconstitutional on that account.

We are satisfied that the terms "pool-selling" and "book-making" are so well understood that no person of ordinary intelligence can misunderstand the import and meaning of the terms and the scope of the acts prohibited by the Penal statute into which they have been incorporated. It would appear that these terms are of general use and that they have a well-accepted and recognized meaning throughout many jurisdictions, and especially among those dealing with the prohibition and regulation of betting on horse races or other contests of skill.

So far as here pertinent, Section 7 of the Penal Code provides:

"The following words have in this code the signification attached to them in this section, unless otherwise apparent from the context:

* * * * * *

"16. Words and phrases must be construed according to the context and the approved usage of the language; * * *."

Section 4 of the Penal Code provides: "The rule of the common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice."

While Webster's New International Dictionary, Second Edition Unabridged, published in 1948, defines the word "bookmaker" as "One who makes books; * * * formerly, a printer and binder; now * * * one skilled in printing and making up the format of books. * * * A compiler of books from other books," it also defines the term, "One who makes a book of bets," and it defines "bookmaking" as "the making of a book of bets."

Count I of the information in the instant case charges that the appellant did "unlawfully and feloniously engage in * * * bookmaking upon the result and purported result" of a horse race.

Having in mind judicial precedent wherein the courts have held that such terms as "banking game" and "poker," although not defined in the statute, may be said to be "commonly known and understood" and thus invulnerable to the charge of vagueness, indefiniteness, and uncertainty, we are convinced that the term "bookmaking" here under consideration and as used in the statute must be held to clearly mean the making of a betting book. That although not defined in the statute the terms "pool-selling" and "book-making" are commonly known and understood, and not therefore subject to the stigma of indefiniteness claimed by appellant. To hold otherwise would require the courts to shut their eyes and ears to the every day happenings of contemporary life. This they can not and will not do.

The foregoing views are supported by the cases of People v. Carroll, 80 Cal. 153, 155, 22 P. 129; Ex parte Lawrence, 55 Cal.App. 2d 491, 496, 497, 131 P.2d 27; Matter of Roberts, 157 Cal. 472, 478, 108 P. 315 (concurring opinion by Henshaw, J.); People v. Corbalis, 86 App.Div. 531, 83 N.Y.S. 782, 784; Id., 178 N.Y. 516, 71 N.E. 106; State v. Morano, 133 N.J.L. 428, 44 A.2d 786, 787; State v. Carr, 6 Or. 133, 135.

We shall next give consideration to appellant's contention that "the court erred in receiving in evidence previous to the establishment of the corpus delicti a purported admission of appellant allegedly made to the arresting officer."

[2] It is now established law in this state that proof of the corpus delicti by evidence of the conclusive and convincing character required to support a conviction of the offense charged is not a pre-requisite to the reception in evidence of the extra-judicial statements of the accused. Prima facie proof is all that is necessary and the corpus delicti may be proved by circumstances shown in evidence or by inferences drawn from facts established. Direct or positive evidence is not essential, nor is it necessary that evidence in proof of the corpus delicti connect the accused with the commission of the crime charged. People v. Hudson, 139 Cal.App. 543, 544, 34 P.2d 741; People v. McMonigle, 29 Cal.2d 730, 738, 177 P.2d 745; People v. Harris, 40 Cal.App.2d 129, 131, 104 P.2d 529; People v. Mason, 37 Cal.App.2d 407, 409, 99 P.2d 567; People v. Vicunia, 105 Cal.App. 145, 147, 286 P. 1061; People v. Wilde, 82 Cal. App.2d 879, 880, 881, 187 P.2d 825.

Disregarding the extra-judicial statements of appellant, the evidence hereinbefore narrated shows that at the time of his arrest he was in possession of all the paraphernalia and equipment necessary to perpetrate the crime of bookmaking as denounced by Subdivision 1 of Section 337a of the Penal Code. He had in his possession all of the paraphernalia commonly used by bookmakers in plying their trade. He was possessed of scratch sheets, owe sheets, and betting markers, the presence of which constitutes the major element of the crime charged. From these facts, exclusive of the admissions of appellant, logical and proper inferences could be drawn, Code Civ.Proc. secs. 1958, 1960, that such paraphernalia was being used for bookmaking purposes, thus establishing the corpus delicti.

[3] While it is true as argued by appellant, that when he made appropriate and timely objection to the introduction of testimony concerning his admissions allegedly made at the time of his arrest, the trial court disposed of the objection with the statement, "I think it (the objection) is good as to Count I but not as to Count II," and later found appellant guilty under Count I, we are convinced that irrespective of appellant's admissions the evidence, aside from the extra-judicial statements, was sufficient to establish the corpus delicti as to Count I, and was sufficient to warrant the introduction into evidence as to said count the admissions of appellant. Therefore, he suffered no prejudice. In view of the action of the court in finding defendant guilty as to County I and not guilty as to Count II the assumption is reasonable that the statement of the court as to the sufficiency of the evidence as to Count I was inadvertent.

Appellant's final contention that the evidence is insufficient to support the decision of the court finding him guilty of the offense charged in Count I can not be sustained.

[4–6] While an appellate tribunal is entitled to consider the evidence it can not weigh it. The sole function of an appellate court is to determine whether on the face of the evidence it can be held that sufficient facts could have been found by the trier of facts to warrant an inference of guilt. Unless it clearly appears that upon no hypothesis whatever is there substantial evidence to support the conclusion reached in the court below, the verdict of a jury or the decision of the trial judge will not be set aside on the ground of insufficiency of the evidence to sustain it. If the circumstances reasonably support the verdict or decision rendered, the opinion of the appellate court that those circumstances might also reasonably be reconciled with the innocence of the accused, will not justify the latter court in interfering with the determination of the trial court People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

[7] It is unnecessary to here again set forth the evidence in the instant case. Suffice it to say that assuming in favor of the conclusion arrived at by the trial judge the existence of every fact which he could have reasonably deduced from the evidence, which included incriminatory admissions by the appellant, it must be held that the circumstances shown reasonably justify his decision in finding the appellant guilty of the offense charged in Count I of the information.

The attempted appeal from the judgment is dismissed. For the foregoing reasons the order denying defendant's motion for a new trial is affirmed.

DORAN and DRAPEAU, JJ., concur.

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95 Cal.App.2d 346

TAINTOR v. SUPERIOR COURT IN AND FOR SANTA CLARA COUNTY.

Civ. 14312.

District Court of Appeal, First District, Division 1, California.

Dec. 28, 1949.

Hearing Denied Feb. 23, 1950.

Proceeding by Charles E. Taintor in prohibition against the Superior Court of the State of California in and for the County of Santa Clara, to prevent said court from hearing a motion for an order directing that court clerk issue an execution to enforce the provisions of a certain judgment against petitioner on the ground that the judgment was void.

The District Court of Appeal, Peters, P.J., held that, although the entry of judgment in default case more than three years after service of summons was error, such error could only be corrected by an appeal from a judgment or on a motion under the Code of Civil Procedure made within six months of the entry of the default and discharged the alternative writ and denied the petition.

1. Judgment 🔑504(3)

Where default was rendered against defendant within three years of service of summons, but judgment was not entered until nearly seven years later, although entry of judgment was error, such error could be corrected only by an appeal from the judgment or on a motion made within six months of entry of the default. Code Civ.Proc. §§ 473, 581a, 585.

2. Judgment 🔑113

Statute providing that after entry of default clerk of court must immediately thereafter enter judgment for the amount demanded in the complaint does not require notice of such proceeding to the defendant. Code Civ.Proc. § 585.

3. Judgment 🔑111, 113

A defendant against whom a default has been regularly entered is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action, and defendant may not thereafter, until the default has been set aside, file pleadings, move for new trial, or demand notice of subsequent proceedings. Code Civ.Proc. §§ 581a, 1014.

4. Constitutional law 🔑309(1)

The notice essential to due course and process of law is the original notice whereby the court acquires jurisdiction and is not the notice of time when jurisdiction, already completed, will be exercised, and whether notice of subsequent proceedings, after the court has acquired jurisdiction by original process, will be required, is a matter of legislative discretion.

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Charles E. Taintor, Los Angeles, petitioner, in pro. per.

John J. Jones, San Jose, for respondents.

PETERS, Presiding Justice.

By this proceeding in prohibition the petitioner seeks to prevent the trial court from hearing a motion for an order directing the court clerk to issue an execution to enforce the provisions of a certain judgment against petitioner on the ground that the judgment is void.

The pertinent dates are as follows:

December 16, 1933: Complaint filed and summons issued in an action for services rendered, brought by Teresa M. Smith in Santa Clara County against petitioner for $1,877 upon an open book account, and upon an account stated.

December 30, 1933: Petitioner was served in Los Angeles County with a copy of the complaint and summons.

March 16, 1934: The default of petitioner was entered.

May 16, 1940: Judgment in favor of Smith and against petitioner for $1,877, plus interest and costs, entered by the Superior Court of Santa Clara County. The register of actions of that court indicates that a hearing was had on that day and the order for judgment was then filed. Attached to this exhibit is a certificate of the County Clerk stating that: "On search being made for Minute entry of Superior Court Clerk of Department 2, on May 16, 1934 [sic 1940] of the Court Order for Judgment in the entitled action * * * it appears that the entry was inadvertently overlooked as no such entry could be found." At any rate, petitioner alleges, and the allegation is admitted by the demurrer, that no notice of the May 16, 1940, hearing was given to him.

July 25, 1949: Smith gave notice to petitioner that on August 19, 1949, she would move the court to issue an execution on the May 16, 1940, judgment.

August 12, 1949: Petitioner notified Smith that on August 19, 1949, he would move the court for an order dismissing the action on the ground that Smith had failed to have judgment entered within three years of service of summons as required by § 581a of the Code of Civil Procedure.

August 19, 1949: Hearing of petitioner's motion.

August 29, 1949: Petitioner's motion denied and Smith's motion set for hearing September 12, 1949.

September 8, 1949: This petition for prohibition filed and an alternative writ issued.

The main contentions of petitioner are that the judgment of May 16, 1940, was void and beyond the jurisdiction of the court in that it was entered in direct violation of the provisions of § 581a, and that such judgment was also void in that petitioner received no notice of the hearing which culminated in the entry of the judgment. Neither contention is sound.

The pertinent paragraph of section 581a reads as follows: "All actions, heretofore or hereafter commenced, must be dismissed by the court in which the same may be pending, on its motion, or on the motion of any party interested therein, if summons has been served, and no answer has been filed, if plaintiff fails, or has failed, to have judgment entered within three years after service of summons. * * *"

[1] In the instant case the default was entered within three years of the service of summons, but the judgment was not entered until nearly seven years after that date. The law is now well settled that, while the entry of the judgment in default cases more than three years after service of summons may be error, such error must be corrected either by an appeal from the judgment or on a motion under section 473 of the Code of Civil Procedure made within six months of the entry of the default. At most, the judgment is erroneous, but it is good on its face, and within the jurisdiction of the court. In Phillips v. Trusheim, 25 Cal.2d 913, 156 P.2d 25, the complaint was filed and summons served in 1938, the default was entered in 1939, and judgment was entered in 1942. Within 60 days of the date of entry of judgment Trusheim moved to vacate, but he did not appeal from the judgment. The trial court granted the motion to vacate, but this order was reversed on appeal. The Supreme Court stated the proper rules as follows, 25 Cal.2d at page 916, 156 P.2d 26: "It is well settled that a trial court has jurisdiction to render a default judgment more than 'three years after service of summons' (Code Civ.Proc. § 581a) although such a judgment is erroneous and subject to direct attack upon an appeal from it. Lynch v. Bencini, 17

Cal.2d 521, 110 P.2d 662; Pavlovich v. Watts, 46 Cal.App.2d 103, 115 P.2d 511; Merner Lumber Co. v. Silvey, 29 Cal.App. 2d 426, 84 P.2d 1062. But if the judgment was entered against Trusheim through the inadvertence or improvidence of the trial court, it had the power independently of statute to correct the mistake by amending or setting aside the judgment (In re Estate of Burnett, 11 Cal.2d 259, 79 P.2d 89; Treat v. Superior Court, 7 Cal.2d 636, 62 P.2d 147; Holtum v. Grief, 144 Cal. 521, 78 P. 11), as this presents no question of judicial review upon the merits. However, judicial error which occurs in the rendition of orders or judgments which are the fault of an exercise of judicial discretion may not be corrected except by statutory procedure." The court then held that, while a motion under section 473 of the Code of Civil Procedure may be a proper way to correct the error of entering a judgment based on a default in violation of section 581a, such motion must be made within six months of the entry of the default.

Lynch v. Bencini, 17 Cal.2d 521, 110 P.2d 662, illustrates the proper way to attack a default judgment entered in violation of section 581a. There, the action was filed in 1934, the default was entered in 1936, and judgment entered in 1939. The defendant appealed from the judgment and from the order denying his motion to vacate. The court held that the judgment was not void on its face and was immune from collateral attack, but could be set aside on an appeal from the judgment. In this connection the court cited, with approval, Cook v. Justice's Court, 16 Cal.App.2d 745, 61 P.2d 357, and Merner Lumber Co. v. Silvey, 29 Cal.App, 2d 426, 84 P.2d 1062, in both of which cases it was held that the trial court has jurisdiction to enter a default judgment in violation of section 581a, and that such judgment may not be collaterally attacked.

[2] It is quite clear that petitioner was not entitled to notice of the hearing of May 16, 1940, as a result of which judgment was entered against him. Section 585 of the Code of Civil Procedure provides that after entry of default, the clerk must "immediately thereafter enter judgment for the amount demanded in the complaint * * *." No notice of this proceeding is required by the section.

In Christerson v. French, 180 Cal. 523, 525, 182 P. 27, 28, the court said: "The fact that he did not enter judgment 'immediately thereafter' in no way prejudiced the rights of the plaintiff and conferred no right on the defendant, whose default had been regularly entered." In W. H. Marston Co. v. Kochritz, 80 Cal.App, 352, 357, 251 P. 959, 962, the court said: "While judgment was not actually entered by the clerk, the default having been entered, the fact that judgment was not immediately entered must be considered as entered [sic] so far as the proceedings in this action are concerned, as the clerk's failure to enter judgment upon the default can in no way prejudice the rights of plaintiff and can confer no right on defendant whose default has been regularly entered."

It is true that these two cases were decided in 1919 and 1926 respectively, while the pertinent provision of section 581a of the Code of Civil Procedure was not enacted until 1933. But the rule of the above cases has been approved and applied since the amendment. Cook v. Justice's Court, 16 Cal.App.2d 745, 61 P.2d 357.

Not only do the provisions of section 585 not require notice of entry of judgment or of proceedings looking towards the entry of judgment, but section 1014 of the Code of Civil Procedure expressly declares in part: "But where a defendant has not appeared [i.e., has defaulted], service of notice or papers need not be made upon him unless he is imprisoned for want of bail."

[3] This rule is clearly stated in 14 Cal. Jur. p. 888, § 19, as follows: "A defendant against whom a default has been regularly entered is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action. He may not thereafter, until the default has been set aside, file pleadings, or move for a new trial, or demand notice of subsequent proceedings." See, also, Christerson v. French, 180 Cal. 523, 182 P. 27.

In Title Insurance & Trust Co. v. King, etc., Co., 162 Cal. 44, 46, 120 P. 1066, 1067 the rule is stated as follows: "If the default cannot be set aside, because it is not a proceeding or order, of what avail would it be to set aside the judgment? The default would stand undisturbed. A default cuts off the defendant from making any further opposition or objection to the relief which plaintiff's complaint shows he is entitled to demand. A defendant against whom a default is entered 'is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action.' * * * He cannot thereafter, nor until such default is set aside in a proper proceeding, file pleadings, or move for a new trial, or demand notice of subsequent proceedings. * * * 'A default confesses all the material facts in the complaint.' Rowe v. Table M. W. Co., 10 Cal. 441. Consequently, if the judgment were vacated, it would be the duty of the court immediately to render another of like effect, and the defaulting defendants would not be heard for the purpose of interposing any denial or affirmative defense."

[4] Thus, it is quite clear that under sections 585 and 1014, and under the cases, petitioner was not entitled to another notice before judgment could be entered against him. This failure to require notice of such a proceeding did not deny to petitioner due process of law. He had notice of the proceeding when he was served with the complaint and summons. Whether notice of subsequent proceedings is necessary depends entirely upon whether some statute requires such notice—there is no constitutional right to notice of such subsequent proceedings. In Gray v. Hall, 203 Cal. 306, 318, 265 P. 246, the Supreme Court stated the applicable rule as follows: "The notice essential to due course and process of law is the original notice whereby the court acquires jurisdiction, and is not notice of the time when jurisdiction, already completely vested, will be exercised. * * * Whether notice of subsequent proceedings, after the court has acquired jurisdiction by original process, will or will not be required is a matter of legislative discretion. After jurisdiction has attached, the party has no constitutional right to demand notice of further proceedings. [Cases cited.] If the defendant in the original action was entitled, by statute or rule of court, to notice of the entry of default and application for the judgment want of such notice does not render the judgment void."

The alternative writ is discharged and the petition is denied.

WARD and BRAY, JJ., concur.

Hearing denied; CARTER, J., dissenting.

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95 Cal.App.2d 483

RAUER'S LAW & COLLECTION CO. v. HIGGINS (HIGGINS, Third-Party Claimant).

Civ. 14129.

District Court of Appeal, First District, Division 2, California.

Jan. 4, 1950.

Rauer's Law & Collection Company sued Claude C. Higgins and recovered a judgment and levied execution on an automobile registered in the name of Anna Higgins, defendant's wife. Anna Higgins filed a third-party claim of ownership with the sheriff, and plaintiff petitioned to determine title to the automobile.

The Superior Court of San Mateo County, Edmund Scott, J., adjudged the automobile to be the community property of defendant and his wife, and therefore subject to execution, and defendant's wife as third-party claimant appealed.

The District Court of Appeal, Dooling, J., affirmed the order, holding that under statute plaintiff could petition for hearing on question of title and that evidence sustained findings.

1. Execution 🔑193

Where judgment creditor levied execution on an automobile registered in the name of judgment debtor's wife, who filed a third-party claim of ownership with sheriff, judgment creditor under statute was entitled to petition court for a hearing on question of title regardless of fact that wife of judgment debtor did not consent to trial on question of title. Code Civ. Proc. § 689.

2. Appeal and error ⚷199

Where judgment creditor levied execution on an automobile registered in name of judgment debtor's wife, who filed a third-party claim of ownership with sheriff, and judgment creditor petitioned court for a hearing on question of title, and judgment debtor's wife did not insist on a jury trial, debtor's wife on her appeal from order of court could not raise question as to whether she was entitled to a jury trial. Code Civ. Proc. § 689.

3. Statutes ⚷223.2(35)

The statute entitling plaintiff or a person in whose favor writ of execution runs, or third-party claimant, to a hearing in court in which action is pending to determine title to property levied upon, is not in pari materia with statute authorizing judgment creditor to maintain action against a person alleged to have property of the judgment debtor, or to be indebted to judgment debtor, and who claims an interest in property adverse to judgment debtor, or denies the debt, and is not in pari materia with statute authorizing punishment for contempt of a person who disobeys order of court in action under such statute. Code Civ. Proc. §§ 689, 720, 721.

4. Execution ⚷194(3)

Evidence sustained finding that an automobile registered in name of wife of judgment debtor was the community property of judgment debtor and his wife and was therefore subject to execution to satisfy judgment against judgment debtor. Code Civ. Proc. § 689.

5. Appeal and error ⚷843(2)

Where District Court of Appeal held that evidence sustained finding that an automobile registered in name of judgment debtor's wife was community property of judgment debtor and his wife and not property of wife, and affirmed order holding that the automobile was therefore subject to execution to satisfy judgment, whether trial court improperly enjoined sheriff from releasing the automobile pending trial of title without requiring an undertaking was a moot question, and would not be decided. Code Civ. Proc. § 689.

Frank V. Kington, Redwood City, for appellant.

Jerome L. Schiller, San Francisco, for respondent.

DOOLING, Justice.

Plaintiff, Rauer's Law & Collection Co., to satisfy a judgment against defendant Claude C. Higgins, levied execution on an automobile registered in the name of Anna Higgins, his wife. Anna Higgins filed a third party claim of ownership with the sheriff and plaintiff then filed a petition in the superior court pursuant to section 689 Code of Civil Procedure to determine title to the automobile. After a trial on this petition the court adjudged the property to be the community property of defendant Claude C. Higgins and his wife, Anna Higgins, and subject to the execution, Anna Higgins appeals.

[1] There is no merit in appellant's claim that title cannot be tried under Code of Civil Procedure section 689 unless the third party claimant consents. The section specifically provides that: "the plaintiff, or the person in whose favor the writ runs, the third party claimant, or any one or more joint third party claimants, shall be entitled to a hearing in the court in which the action is pending * * * for the purpose of determining title to the property in question." Here the plaintiff petitioned for the hearing as the section expressly authorized it to do.

[2] We need not discuss appellant's contention that she was entitled to a jury trial since appellant's counsel stated at the beginning of the hearing that "there is no such thing as a jury trial in this proceeding; but, in order to keep the record clear that we were insisting upon trial—a civil action which we have instituted, it so happens—I filed that demand for that purpose, to keep the record clear." It was appellant's

position, as this quotation shows, not that she was entitled to a jury trial in this proceeding, but that her title could not be tried in this proceeding. In that she was in error, and since she did not insist on a jury trial in this proceeding the question is not available to her on this appeal.

[3] Appellant's insistence that title cannot be tried under Code of Civil Procedure section 689 unless the third party claimant consents is based on the erroneous assumption that this section is in pari materia with Code of Civil Procedure sections 720-721. The proceedings are entirely distinct and while title cannot be tried in proceedings taken under sections 720-721, it can be tried under the express terms of section 689 where a third party claim has been filed with the sheriff who levied the execution. Fulton v. Webb, 39 Cal.App.2d 509, 103 P.2d 596; Retailers' Credit Ass'n of Sacramento v. Superior Court, 19 Cal.App.2d 457, 65 P.2d 937.

[4] On the merits the evidence is sufficient to support the trial court's finding. Appellant's evidence was self-contradictory. She testified that she personally paid for the automobile in cash that she had in her home. She testified, when asked the source of this cash: "Well, my husband works and brings it home to me, that's all." She later testified that she got the cash from the sale of a house that was her separate property. She and her husband both testified that appellant personally made the payments to the seller. The seller testified that the husband, not appellant, paid her the money. It was for the trial court to resolve these conflicts.

[5] Appellant also complains that the court enjoined the sheriff from releasing the property pending the trial of title without requiring an undertaking. We need not decide whether this was error since that question has now become moot.

The order determining title is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

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95 Cal.App.2d 296

LENK v. SPEZIA et al.

Civ. No. 7574.

District Court of Appeal, Third District, California.

Dec. 22, 1949.

Action by Fred Lenk against Victor Spezia and another, individually and doing business as co-partners, to recover for loss of honey and bees allegedly killed as a result of negligence of defendants in dusting nearby tomato crops from an airplane with poisonous insecticide.

The Superior Court for Yolo County, C. C. McDonald, J., entered judgment for defendants, and plaintiff appealed.

The District Court of Appeal, Thompson, J., held that the evidence sustained finding that plaintiff's loss was due to his own contributory negligence in refusing to remove hives or adequately screen them during periods of dusting and affirmed the judgment.

1. Animals ⚷44

In action for loss of honey and bees allegedly killed as a result of negligence of defendants in dusting tomato crops in vicinity of hives from an airplane with poisonous insecticide, evidence sustained finding that defendants did not negligently deposit insecticide upon hives of bees or upon their feeding fields.

2. Animals ⚷44

In action for loss of honey and bees allegedly killed as a result of negligence of defendants in dusting tomato crops in vicinity of hives with poisonous insecticide, evidence did not establish as a matter of law that bees were poisoned by insecticide released from defendants' airplane.

3. Animals ⚷44

In action for loss of honey and bees allegedly killed as a result of negligence of defendants in dusting tomato crops in vicinity of hives from airplane with poisonous insecticide, plaintiff had the burden of proving that bees were killed by the poisonous dust used by defendants and that defendants were negligent in the manner in which they dusted adjacent tomato fields and that such negligence was the proximate cause of death of bees.

4. Appeal and error 🔑931(1)

On appeal from judgment entered on findings favorable to defendants, reviewing court must view the evidence and reasonable deductions to be drawn therefrom in the light most favorable to defendants and must resolve all conflicts of evidence in support of findings and judgment, if reasonably possible.

5. Appeal and error 🔑1010(1)

Reviewing court may not interfere with judgment based on findings of fact supported by substantial evidence.

6. Appeal and error 🔑996

Where reasonable minds may differ regarding the sufficiency of the evidence to establish essential facts to support adopted findings, reviewing court is bound by judgment of trial court.

7. Animals 🔑44
Poisons 🔑6

One engaged in spraying or dusting fruit, vegetables or other products from an airplane or otherwise may become liable for resulting damage if he negligently spreads liquid or powder known to contain a poison in such a manner as to endanger the lives of bees, animals or property of another person in the immediate vicinity.

8. Animals 🔑44

The law with respect to liability for negligently causing death of or injury to animals applies to domesticated bees.

9. Animals 🔑1

Aphidae bees are "ferae naturae".

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Ferae Naturae".

10. Animals 🔑96

Owner of bees cannot recover for their death from poisonous compound procured while trespassing on land of another, unless the poison was distributed wantonly, maliciously, or with deliberate intent to injure or destroy the bees.

11. Animals 🔑96

Owners of land and persons engaged in dusting crops on such land with insecticide owe no duty to protect trespassing bees of another from danger of poisonous insecticide.

12. Animals 🔑96

Landowner is not liable for death of trespassing animals from poison on his premises, where poison was intended for another purpose and landowner was not guilty of gross or wanton negligence.

13. Animals 🔑44

Evidence that experienced beekeeper knowing that tomato crops in the vicinity were to be dusted from an airplane with poisonous insecticide refused to remove hives or to adequately screen them during period of dusting sustained finding that loss of bees was the result of his own contributory negligence so as to preclude recovery therefor.

14. Animals 🔑44

Failure or refusal of owner, having full knowledge of anticipated or actual performance of acts which will result in injury to animals or bees, to exercise reasonable precaution to protect them constitutes "contributory negligence" which will preclude recovery of damages for such injury.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Contributory negligence."

15. Animals 🔑44

Contributory negligence of owner of animal is a bar to recovery for its injury or death.

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A. G. Bailey and John A. Young, Woodland, for appellant.

Russell A. Harris, Sacramento, for respondents.

THOMPSON, Justice.

The plaintiff brought suit for damages against the defendants as individuals and as copartners for negligently killing 518 hives of bees and causing the loss of 14 tons of honey which would have otherwise been produced. It is alleged the bees were poisoned by the negligent dusting of crops of tomatoes with insecticide compound containing arsenic of trioxide, from an airplane, and thus permitting the poisonous dust to drift or lodge on plaintiff's hives and bees which were located near by, and by depositing the poisonous insecticide on the feeding fields of the bees. The cause was tried by the court sitting without a jury. Findings were adopted favorable to the defendants in every essential respect. A judgment was rendered accordingly to the effect that plaintiff is entitled to take nothing by this action. From that judgment this appeal was perfected.

The answer denies the material allegations of the complaint, except that it is admitted the defendants dusted tomatoe crops in that vicinity from their airplane with insecticide powder containing a small proportion of arsenic, for the necessary benefit and protection of said crops of tomatoes from prevalent insects, worms and pests. The answer specifically denies that defendants deposited or negligently permitted poisonous insecticide to be carried to or spread upon plaintiff's bees or feeding grounds, and affirmatively alleges that plaintiff's loss of bees and honey was due to his own contributory negligence in failing and refusing to remove the hives or to protect the bees from the poisonous dust in spite of the fact that he had previous knowledge of the defendants' intention to use that powder to dust the tomatoe crops in the vicinity of his hives.

The court found that plaintiff owned the hives and bees which he kept in several colonies in Lisbon and Clarksburg districts in Yolo County; that said bees ranged over a wide field at distances of five miles from their hives in search of nectar and pollen; that defendants did not spread or deposit insecticide powder negligently or at all upon plaintiff's bees or upon their feeding grounds; that the defendants were not negligent in dusting the crops of fruit or tomatoes in fields adjacent to the places where plaintiff's hives and bees were kept; that said bees were not poisoned and did not die as a result of defendants' negligence or carelessness in dusting the crops in that vicinity. On the contrary, the court affirmatively found that the bees were destroyed on account of the contributory negligence of plaintiff in failing and refusing to exercise any care for their protection in spite of the fact that plaintiff had full knowledge of defendants' intention to use the poisonous insecticide in dusting the tomato crops on fields in the immediate vicinity of his hives of bees.

The evident theory of the court was that the cause of the death of plaintiff's colonies of bees was his negligence in deliberately releasing his bees from their hives and permitting them to range over the surrounding fields for nectar and pollen, when he had full knowledge that crops in adjacent fields had been or were about to be dusted with insecticide powder containing arsenic which he knew to be poisonous to bees.

[1] The appellant's theory of the cause of the death of his bees was that defendants released the poisonous insecticide powder from their airplane when the wind was blowing directly toward the place where their hives were stationed, and that the poisonous compound drifted to and upon his hives and bees. There is a conflict of evidence upon that issue. In effect the court found against the plaintiff on that theory by determining that the defendants did not negligently deposit insecticide dust or powder upon the hives or bees, or upon their feeding fields. There is substantial evidence to support that finding.

Honey bees often obtain the poison when feeding on blossoms in fields which have been dusted or sprayed for the protection of the crops and carry it back to the hives in the nectar or pollen, which sometimes results in the death of the entire colony of bees.

In Roy A. Grout's recent volume, "The Hive and the Honey Bee", the author says that for many years toxic compounds have been used to protect fruit and vegetables from pests. The trees and vines are usually sprayed when they are in full bloom. That is the very time when the bees visit them in search of nectar and pollen. It is difficult to protect the fruit and vegetables from pests without detriment to the bees which usually get the poison from the blossoms after they have been sprayed or dusted. They sometimes die immediately or soon if they get sufficient poison. But they often take it back to the hive in the nectar or pollen or both, which sometimes results in the death of the entire colony of bees.

[2] We are of the opinion that the evidence adequately supports the findings and judgment. We are convinced that large numbers of plaintiff's bees died in and about their apiaries, and probably they died from poisoned insecticide which they procured in other fields while they were ranging in search of coveted nectar or pollen, or from poisoned dust which drifted with the wind from other fields to the hives of plaintiff. But we are unable to say, as a matter of law, that they were poisoned by the insecticide which was released from defendants' airplane. There is some evidence that other farmers were dusting their crops in that vicinity about the same time. One of said crops was located just across the river from one of plaintiff's apiaries.

[3-6] In the present case the burden was on plaintiff to prove, not only that it was the poisonous dust used by the defendants which killed his bees, but also that defendants were guilty of negligence on account of the manner in which they dusted the adjacent tomato fields, and that such negligence was the proximate cause of the death of the bees. This court must view the evidence and the reasonable deductions to be drawn therefrom in a light most favorable to the respondents, and must resolve all conflicts of evidence in support of the findings and judgment, if reasonably possible. Davis v. Stulman, 72 Cal.App.2d 255, 164 P.2d 787. Even though we might differ with the conclusions of the trial court regarding the weight or sufficiency of the evidence to show negligence on the part of the defendants, since there is substantial evidence to support the findings we cannot interfere with the judgment of the trial court. When reasonable minds may differ regarding the sufficiency of the evidence to establish essential facts to support adopted findings, a reviewing court is bound by the judgment of the trial court. That is the situation in the present case. For that reason we may not interfere with the judgment in this case.

[7] It is true that a defendant who is engaged in spraying or dusting fruit, vegetables or other products with the use of an airplane, or otherwise, by negligently spreading liquid or powder known to contain a dangerous proportion of arsenic or other poisons, in such a manner as to endanger the lives of bees, animals or property of another person in the immediate vicinity, may become liable for the damages resulting therefrom. Miles v. A. Arena & Co., 23 Cal.App.2d 680, 73 P.2d 1260; Lundberg v. Bolon, 67 Ariz. 259, 194 P.2d 454; S. A. Gerrard Co., Inc., v. Fricker, 42 Ariz. 503, 27 P.2d 678; Hammond Ranch Corporation v. Dodson, 199 Ark. 846, 136 S.W.2d 484.

But in the Miles case, supra, a judgment was rendered against the defendant for negligently dusting a field of honeydew melons by means of an airplane from which poisonous insecticide was spread while a wind was blowing directly toward plaintiff's land where the hives of bees were located. That judgment was affirmed on appeal because the evidence was completely satisfactory, if not undisputed, that the defendant knowingly released the poisonous dust from its airplane while the wind was blowing toward plaintiff's hives and the poison actually reached the hives and killed all the bees they contained, including the queen bees which are known to remain in their hives. That is some proof that the bees in and about the apirar died from the poisoned compound which drifted from the field dusted by the defendant. Specimens of the identical dust taken from the bees and the hives were procured and analyzed. The trial court adopted definite findings that it was the defendant's poisonous dust which drifted to and upon plaintiff's bees and killed them. In the present case the findings were just the contrary in that regard. The Appellate Court said [23 Cal.App.2d 680, 73 P.2d 1262]:

> "* * * He should not do the dusting, or have it done, under conditions which would indicate to a reasonably prudent person that damage to his neighbor would result.
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> * * * * * *
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> "Defendants knew, or should have known, that the light dust projected under pressure onto the melons would float in

the air. There is evidence that a light breeze was blowing during the dusting operations. They should have known that the dust would float for a considerable distance when propelled by such a breeze. Dusting material containing a poison that would kill bees was used. Under the conditions prevailing at the time they should have foreseen the ensuing damage to plaintiff. It follows that they must respond in damages.

* * * * * *

"* * * There is ample, competent and material evidence in the record to support the finding that plaintiff's bees were killed by the poisonous dust that drifted from the A. Arena & Company field."

The other cited bee cases are similarly determined upon ample evidence of negligence to support the findings and judgments. In each case, the judgment was affirmed on appeal for the same reason. Those cases are distinguishable from the facts of the present case.

[8] It appears that the law with respect to liability for negligently causing the death of or injury to animals also applies to bees when they have become domesticated. They fall within the same category. See Rexroth v. Coon, 15 R.I. 35, 23 A. 37, 2 Am.St.Rep. 863; 3 C.J. p. 16, § 1, 3 C.J.S., Animals, § 1.

[9] The life and habits of the bee are extremely interesting subjects. The aphidae bee is ferae naturae. Brown v. Eckes, City Ct., 160 N.Y.S. 489, 491–492. The honey bee is highly socialized, and has become domesticated. It hails from ancient Lebanon in the Holy Land and Egypt, where it was highly prized. (Gen. 43:11.) It produces honey and wax for the profit and enjoyment of mankind. This industrious insect is short-lived. It lives and labors only from three to six months, but it improves every moment of its brief existence. Nature has provided the bee with a marvelous elongated proboscis with which it dips deep into the pistil or stamen of flowers to extract the secreted nectar for its store of honey. It gathers pollen and mixes it with nectar to form a paste which it packs away in its amazing duffle-bags, called the scopa, on its lower legs, to be carried to the "palace of the queen" to furnish food for the larvae; it augments the wind as a carrier of pollen to fertilize the blossoms of fruit trees to help produce bountiful crops. The bee is a forager by nature and frequently flies a distance of ten miles from its hive in search of coveted food. For instruction on the biography of the bee, reference is made to John Muir's "The Bee Pastures of California", Maurice Maeterlinck's "Life of the Bee", "The Hive and the Honey Bee" by Roy A. Grout, Frank Stuart's "City of the Bees" and A. I. Root's "A. B. C. and X. Y. Z. of Bee Culture". Valuable information may be derived from these classics. The "busy bee" has contributed much to the pleasure and profit of mankind. The bee industry is entitled to the protection of the law, as indeed are all branches of husbandry which so greatly contribute to the welfare of mankind.

There is much evidence and argument in the briefs regarding the question as to whether plaintiff's bees were poisoned from defendants' insecticide while feeding on the sweet anise, morning glory, star thistle or other blossoms in or near the tomato fields which had been dusted. Respondents contend that if that be true they would not be liable for damages since the bees were trespassers and they owed no duty to protect plaintiff's property interest therein.

[10, 11] If plaintiff's bees procured the poisonous compound from which they died while they were trespassing on the fields of other owners of land, it appears that the plaintiff could not recover damages unless the poison was distributed wantonly, maliciously, or with the deliberate intent to injure or destroy the bees. There is no evidence in this case of such wanton or malicious conduct. Under such circumstances there was no duty on the defendants or the owners of the land to protect plaintiff's trespassing bees from the danger of said poisonous compound. Holt v. Mundell, 107 Colo. 373, 112 P.2d 1039, 1043; Jeanes v. Holtz, 94 Cal.App.2d 826, 211 P. 2d 925; 3 C.J.S., Animals, pp. 1329, 1330, § 213(d) bb.

In the Holt case, supra, defendant sprayed his crop of maize with a compound containing poison to protect the growing grain from grasshoppers which were prevalent and harmful to his crop. Plaintiff's cattle trespassed on that land and evidently procured some of the poisonous mixture, as a result of which several cows died. Plaintiff brought suit for damages and recovered judgment. On appeal the judgment was reversed. The court held that because the cattle were trespassing on the land at the time they procured the poisonous mixture from which they died, the plaintiff was precluded from recovering damages. Quoting with approval from the text in 33 A.L.R. at page 449, the court said in that regard: "* * * In general, it may be said that the owner of premises, inclosed or otherwise, is not bound to keep them safe for trespassing animals, and is not liable for injuries to such cattle resulting from eating or drinking poisonous or other substances on the premises; and this is true both in sections where stock are lawfully allowed to run at large, and in jurisdictions where the common-law rule as to keeping animals from straying is in force."

[12] In 3 C.J.S., Animals, § 213(d) bb, at pp. 1329, 1330, it is said in that regard: "An owner is not liable for death to trespassing animals from poison on his premises where the poison was intended for another purpose, and he was not guilty of gross or wanton negligence."

We are of the opinion the same rule applies to trespassing bees.

But the plaintiff in this case appears to rely chiefly on his contention that the poisonous insecticide was negligently permitted by the defendants to be carried by the wind, while they were dusting the tomato crops in adjacent fields, to and upon the hives and bees of plaintiff. The court adopted findings adverse to plaintiff on that issue. There is a conflict of evidence in that regard. But there is substantial evidence to support those findings.

In 1945 the plaintiff owned and maintained hives of bees in four localities. One apiary was located on the "Morton place" near Clarksburg on the Sacramento River. Another was kept on defendant's "home place" at Winchester out on the Sacramento River. A third apiary was maintained nearby at the Lisbon-Glide property on the Sacramento River and the fourth apiary was on the Rogers-Perelli property. In 1946 he maintained only two apiaries, one of which was on his home place and the other on the Lisbon-Glide property. Plaintiff was an experienced beekeeper, having been engaged in that industry for some thirty-eight years. Many farmers in that vicinity produced tomatoes, which they were accustomed to spray or dust in the months of August and September of each year to protect the crops from worms, insects and other detrimental pests. The plaintiff knew of that fact. He knew that the insecticide used by the defendants was poisonous to the bees. He was personally notified and knew that they intended to use that compound to dust the tomato crops. He had previously protected his bees on such occasions by either removing the hives or by screening them. But upon the occasions complained of in this suit, with knowledge of the intention of the defendants to dust the crops, he failed and refused to take any of said precautions to protect them. On the contrary, he removed the screens and permitted the bees to leave their hives and go at large.

The defendants were engaged in dusting tomato crops in the vicinity of plaintiff's apiaries by blowing the insecticide upon the vines and crops from an airplane. In July and August, 1946, defendants dusted the tomato crop of Mr. Pylman which was situated three-quarters of a mile northeast of plaintiff's home place. In August of that year he similarly treated the tomato crop of Mr. Fonts, situated about one-half mile northwest of plaintiff's Lisbon apiary. That same year they dusted the tomato crop of Mr. Silva situated one mile northwest of plaintiff's same premises. And in August of that year they dusted a large tomato crop belonging to Mr. Krull, which was located two miles southwest of plaintiff's home place. There is evidence that other operators also dusted other crops in that vicinity in a similar manner. Defendants testified that before dusting said crops they personally notified plaintiff of their intention to do so, and offered to use their trucks to assist him in removing his hives to a safe place, but that he refused to take any means of protecting his bees, saying, with respect to a particular crop, that, "If we dusted that job he would sue us." Mr. Borges, one of the defendants, testified that before proceeding to dust the crops, they flew their airplane along the border of the fields and released powder to determine whether it would be carried by the wind toward plaintiff's apiaries, and that if the wind was blowing in that direction they delayed the proceeding of dusting. He said that when they actually dusted the crops the wind was blowing "just the opposite direction." There is also evidence that just before dusting the tomato crop adjacent to plaintiff's home place, with knowledge of their intention to do so the plaintiff removed the screens which he had previously placed over the hives.

It is true that plaintiff lost many colonies of bees as the probable result of poisonous insecticide used by someone. He found many dead bees in his yard and about the hives. He testified that the powder which he found upon the hives and bees, and which was analyzed and found to be poisonous, was *gray* or *green* in color. But the defendant Spezia testified that the only insecticide which they used was *pink* in color. The evidence fails to show that any pink powder was found on plaintiff's bees, hives or premises.

[13] The foregoing evidence not only fails to satisfactorily show that it was the insecticide which was used by the defendant to spray the crops of tomatoes that killed plaintiff's bees, but there is substantial proof that, with full knowledge on the part of plaintiff that it was to be used, he failed and neglected to exercise ordinary precaution to either remove his hives or to adequately screen them during the periods of dusting, for protection of the bees. We are of the opinion the evidence on that subject sustains the findings of the court that plaintiff lost his bees as a result of his own contributory negligence.

[14, 15] When the owner of animals or bees contributes proximately to their injury or death, he is thereby barred from recovery. If the owner of animals or bees has full knowledge of anticipated or actual performance of acts which will result in injury, and he fails and refuses to exercise reasonable precaution to protect them, he is guilty of contributory negligence which will preclude him from recovering damages. Richards v. Waltz, 153 Mich. 416, 117 N.W. 193; 2 Restatement of the Law of Torts, p. 1288, sec. 498b; 45 C.J. 976, sec. 530; 19 Cal.Jur. 644, secs. 74–76; 3 C.J.S., Animals, p. 1330, § 215. In the text last cited it is said: "Contributory negligence of the owner of the animal is a bar to a recovery."

We are constrained to hold there is ample evidence in this case to support the findings that plaintiff is barred from recovery by his contributory negligence.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

RICHTER v. WALKER et al.

Civ. 7639.

Sac. 6000.

District Court of Appeal, Third District, California.

Jan. 3, 1950.

Rehearing Denied Feb. 1, 1950.
Hearing Granted March 2, 1950.*

Paul Richter sued Donald Walker and others to foreclose a mechanic's lien for labor performed and materials furnished under an oral contract to drill a water well and to install a pump, and the named defendant and others cross-complained.

The Superior Court, Tehama County, H. S. Gans, J., rendered a money judgment for plaintiff against named defendant and others, but denied a lien, and plaintiff appealed.

The District Court of Appeal, Adams, P. J., reversed the judgment, holding, inter alia, that findings did not justify the judgment.

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* Subsequent opinion 226 P.2d 593.

1. Contracts ⚿354
Mechanics' liens ⚿290(4)

Findings which did not include a finding that plaintiff, who was employed by defendant to drill a water well, guaranteed to drill a well that would produce the amount of water desired by defendant, or a finding that well drilled was valueless because of other defects, did not justify judgment disallowing plaintiff recovery for drilling, and allowing defendant to recover on cross-complaint amount defendant allegedly paid out to minimize damages, and disallowing to plaintiff a mechanic's lien, at least to extent of value of plaintiff's work.

2. Damages ⚿62(1)

To "minimize damage" means that one who has suffered damage through the negligence or wrongful acts of another must exercise reasonable care to avoid loss or to minimize the consequences of such injury, and it does not mean an enhancement of damages, and a reasonable or moderate expenditure is required.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Minimize Damage".

3. Damages ⚿123

A plaintiff who was employed to drill a water well was entitled to recover price stipulated by contract unless the well was of no value to defendant because of unworkmanlike manner of drilling well, or because plaintiff agreed to drill a well that would produce a specified quantity of water per minute, and well failed to produce the specified quantity, in which case defendant would be entitled to a deduction from the recovery of damages sustained by plaintiff's failure strictly to perform.

4. Damages ⚿45

If defendant was entitled to any offset from price he contracted to pay plaintiff to drill a water well, because of failure of plaintiff to strictly perform contract, defendant was entitled only to the reasonable cost of whatever was done to minimize damage and was not entitled to recover any extraordinary expenditure made by defendant.

5. Mechanics' liens ⚿198

Under statute a mechanic's lien is prior to liens recorded after lien claimant commenced his work, and trial court improperly held mechanic's lien to be subordinate to liens recorded after mechanic's lien claimant commenced his work but before lien claimant completed his work. Code Civ.Proc. § 1183.

6. Mechanics' liens ⚿310(3)

Under statute, mechanic's lien claimant was entitled to recover the notary fee and cost of recording lien claim as costs, but was not entitled to recover expenditures for preparation of claim, the latter being in the nature of an unallowable attorney's fee. Code Civ.Proc. § 1195.

7. Mechanics' liens ⚿310(3)

Mechanic's lien claimant who had drilled water well for defendants was not entitled to recover as costs, money expended by claimant for a title search of defendant's land, in absence of statute so authorizing.

8. Costs ⚿3

The right to recover costs is purely statutory and he who seeks to recover costs must put his finger on a statute which awards them.

◆

Curtiss E. Wetter and Rawlins Coffman, Red Bluff, for appellant.

Alfred E. Frazier, Red Bluff, for respondents.

ADAMS, Presiding Justice.

Plaintiff Richter brought this action to foreclose a mechanic's lien for $3,187.22, with interest from June 27, 1947, for labor performed and materials furnished under an oral contract to drill a water well on the premises of defendants Walker in Tehama County and install a pump therein. In their answer defendants alleged that in October, 1945, they entered into an oral contract with Richter to drill the well to a depth of 200 feet, if necessary, and agreed "that such well would produce Six

Hundred (600) gallons of water per minute." They admit that plaintiff entered upon drilling operations, but allege that he failed to complete same in accordance with specifications or in a workmanlike manner, and that, as a proximate result of the carelessness, inefficiency and negligence of plaintiff, the well, as left by plaintiff, produced no more than 150 gallons per minute; that the pump installed by plaintiff was not the proper kind of pump for the kind of well produced, in that it was inefficient and too expensive for economical operation; that the well as constructed by plaintiff was "of absolutely no value whatever to defendants," and that they would have to drill an entirely new one.

Defendants Walker then cross-complained, seeking damages in the sum of $12,653.00 for plaintiff's alleged breach of the contract. Plaintiff denied the allegations of the cross-complaint, including a denial of the allegation that he agreed to drill a well that would produce water at the rate of 600 gallons per minute. At the trial Walker testified that plaintiff did so agree and plaintiff denied it; but on this appeal respondents have apparently abandoned such contention since they admit that the plaintiff "did not guarantee that he would find or produce water," and the court did not find that such a guarantee was made.

The findings recite that plaintiff agreed to drill the well at a cost of $5.00 per foot, to furnish the casing therefor, and supply a proper pump and motor; that the well should be drilled to a depth of 200 feet if necessary to procure adequate water, and that he would drill same in a good and workmanlike manner; that he drilled the well and inserted the casing, and about March 22, 1947, completed all of his work concerning the said premises; that he supplied a pump and motor at an agreed price of $1350.50, and that the sale of same was separate and distinct from the contract for the drilling of the well. However, it found that Richter did not drill the well in a good or workmanlike manner and that it is defective; that he was fully informed concerning the requirements of volume of water from said well to make same economical and practicable, and the amount of water so required was between 450 and 500 gallons per minute; that "if said well had been drilled in a good and workmanlike manner it *might* have produced the volume of water required," but that it failed to produce more that 150 gallons per minute, and that such failure was *"partly due* to the bad and unworkmanlike manner of drilling performed" by said plaintiff; that the "said well is of *slight or very little value* to the defendants," and "is of only slight value to the said premises," and "does not constitute any improvement whatever to said premises" (Italics added); that immediately after plaintiff ceased drilling he was informed by cross-plaintiffs of the defective condition and given ample opportunity to improve same and correct any errors made, but failed and refused to do anything, and that the Walkers undertook to make improvements and expended the sum of $653.00 therefor. It was found that plaintiff had filed his claim of lien, but that his claim was subsequent to other claims, and subordinate thereto; and "that said well is valueless to any portion of the said premises." It found that the defendants Walker were indebted to plaintiff in the sum of $1350.50 for the pump, but that Richter was indebted to them for $653.00 which they expended to improve the well.

A judgment for plaintiff against the Walkers for $697.50 with costs was entered, but a lien was denied. Plaintiff has appealed from said judgment.

Plaintiff was allowed nothing for the drilling of the well, and from the amount found to be due him for the pump, the court deducted the amount expended by the Walkers, though it found that the sale of the pump was separate and distinct from the contract for the drilling of the well. It is also inferable, if not apparent, that the finding that the well is of "slight or very little value" to defendants is based upon the failure of said well to produce more than 150 gallons of water per minute. And while it was found that plaintiff did not drill the well in a good or workmanlike manner, and that same is defective, there is no finding as to the respects in which plaintiff failed, or as to any defect except that the well failed to produce the 450 or 500 gallons of water which it *might* have produced if drilled in a good or workmanlike manner.

As for the finding that the well was not drilled in a workmanlike manner, it is not disputed that drilling was started March 15th and ceased March 22nd; that it was drilled where Walker directed and to a depth of 173 feet, and cased to a depth of 168 feet; that it was then capped. The pump was not installed until June 26th, as it was not obtainable until that time. There was testimony that at the conclusion of the drilling the well should have been pumped, in order to clean out fine materials in the water-bearing strata; that the delay in putting in the pump was excessive.

In an opinion, filed prior to the making of the findings in the case, the trial court said that the evidence was conflicting as to whether the well was drilled in a workmanlike manner, but added: "* * * The well was straight and did not bind the pump. Either there was or there was not a sufficient supply of water in the well. When drilling stopped all thought it was there. To assume that it should be there because of some other wells in the vicinity has a certain relation to the probabilities; but there are wells and wells. If it be claimed the water is there but was sealed off by the driller, it would seem in part refuted by the fact of pumping 300 gallons for a short time. If there was too much perforation and this permits an undue amount of sand etc. to enter the well, that must be in part due to the acts of the owner in having extra work done along that line. All in all, it seems to me that the water, is simply not there in sufficient quantity. If so the Plaintiff must prevail."

After the rendition of that opinion the case was reopened for the testimony of O. L. Wilder, an expert well driller of some 38 years' experience, who, at Mr. Walker's request, had worked on the well in November, taking sand and gravel therefrom, and in January had gone there again, at which time he took out more sediment, and extended the casing of the well to the bottom of it; also, at Mr. Walker's request, he had made additional perforations in the casing. He said that in his opinion the sooner a well is pumped after drilling, the better; but he testified that the well was drilled straight, and that when he left it he thought it was in good shape.

The well, however, failed to produce the amount of water which the Walkers contend was necessary for their use; but it does not appear from the evidence or from the findings that such failure was due to defects in the well or to delay in bailing it, since, when bailed out by Wilder, it would not produce it. The conclusion seems inevitable that the well was deemed defective only in that it failed to produce the desired amount of water, and, perhaps, that plaintiff was at fault in not bailing it immediately after the drilling was completed, though there is testimony that it was so bailed. Therefore, unless it can be said that plaintiff guaranteed to drill a well that would produce the desired amount of water, he should have been allowed the amount agreed to be paid him, less, perhaps, the reasonable cost of bailing it.

However, there is no finding that plaintiff made such a guaranty, nor was it found that the well has no value because of other defects. There is no finding that if drilled in any other manner it would have produced 450 to 500 gallons of water per minute—only that it might have done so; and the finding that it is of slight or very little value seems to have been a conclusion based upon its failure to so produce.

The Wisconsin case of Borg v. Downing, 221 Wis. 463, 266 N.W. 182, 183, involved a contract for drilling a water well. During the course of the opinion the court said: "Before applying the tests prescribed by those rules to this case, it should also be noted at the outset that 'in a contract of well drilling there is no implied undertaking that water shall be obtained, or that the well shall be a success as to the quantity or quality of the water obtained, but only that the work shall be done in a workmanlike manner, with such skill as may ordinarily be expected from those who undertake such work.' In approving an instruction to a jury to that effect, this court said, in Butler v. Davis, 119 Wis. 166, 170, 96 N.W. 561, 562: 'The uncertainty of obtaining a supply of good water, however skillfully the work is done, is matter of common knowledge. If well diggers were to be held to guarantee such results whenever they undertake to dig a well, we think there would be a great scarcity of diggers.'"

Omaha Consolidated Vinegar Co. v. Burns, 49 Neb. 229, 68 N.W. 492, 493, involved a water well drilling contract. The court there said: "If the agreement is executed without provision that a specific flow of water shall be obtained, as was this one, then the labor and materials must be paid for as per contract, be the flow of water little or much."

That case was cited with approval in Skalsky v. Johnson, 138 Minn, 275, 164 N.W. 978, 979, L.R.A.1918A, 1084, where the court said as to the quality of the water to be produced in a water well: "There is no sound reason for holding that because a well-digger agrees to dig a well on a farmer's farm he warrants to the farmer the quality of the water underlying the farm." Also see Lemke v. Hage, 142 Wis. 178, 125 N.W. 440, 441, 135 Am.St.Rep. 1066.

[1] We therefore conclude that the findings are insufficient to support the judgment which not only disallows plaintiff anything whatsoever for the drilling, but goes farther and penalizes him in the sum of $653.00, apparently the amount defendants paid out, as they claim, to "minimize" the damages.

[2] "Minimize", however, means "To reduce to the smallest part or proportion possible." Webster's New International Dictionary. And to minimize damage means that one who has suffered damage through the negligence or wrongful acts of another is bound to exercise reasonable care to avoid loss or to minimize the consequences of such injury. It does not mean an enhancement of damages. Also a reasonable or moderate, and not an extraordinary expenditure is required. It is said in 15 Am.Jur., sec. 27, pp. 420–422: "One who is injured by the wrongful or negligent acts of another, whether as the result of a tort or of a breach of contract, is bound to exercise reasonable care and diligence to avoid loss or to minimize or lessen the resulting damage, and to the extent that his damages are the result of his active and unreasonable enhancement thereof or are due to his failure to exercise such care and diligence, he cannot recover; or, as the rule is sometimes stated, he is bound to protect himself if he can do so with reasonable exertion or at trifling expense, and can recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided."

In Winans v. Sierra Lumber Co., 66 Cal. 61, 65, 4 P. 952, 955, the court said: "The law imposes upon every one engaged in the performance of a contract the duty of doing everything in his power to prevent loss to himself from a breach of the contract by the other party. If he cannot prevent it altogether, he must make reasonable exertions to render it as light as possible; and if, by his own negligence or willfulness he allows the damages to be unnecessarily enhanced, the increased loss must fall upon him. Hamilton v. McPherson, 28 N.Y. 72, [84 Am.Dec. 330]."

[3, 4] The measure of recovery in a case such as this, is the sum stipulated in the contract, less the damages sustained by the failure strictly to perform, Norton v. Meyers, 98 Cal.App. 175, 179, 276 P. 611; Standard Cabinet Works v. Nathan, 117 Cal.App. 584, 585, 4 P.2d 166; and unless it can be said that the well is of no value to defendants, and that such fact is due to the unworkmanlike manner of drilling same, or that it is of no value because plaintiff agreed to drill a well that would produce between 450 and 500 gallons of water per minute, plaintiff is entitled to recover at least the amount provided to be paid by his contract, less the damages, if any, sustained by defendants by his failure strictly to perform. He should not be deprived of any allowance for the work

done. It is not found that he agreed to drill a well that would produce the aforesaid amount of water, nor is it found that its failure to produce more than 150 gallons per minute was entirely due to bad drilling, or that the well has no value. The only thing shown by the evidence to have been done by respondents was to bail the well after the drilling was completed, and to extend the casing, but even after that it did not produce in excess of the amount obtainable theretofore; and if defendants are entitled to any offset from the contract price, only the reasonable cost of whatever was done to minimize their damages is allowable for that purpose.

[5] As for plaintiff's right to a lien, section 1186 of the Code of Civil Procedure provides that a mechanic's lien is prior to liens recorded *after* the lien claimant commenced his work. The record shows that plaintiff started drilling March 15, 1957, and that the liens to which the court gave priority were recorded after that date. Apparently the trial court concluded that plaintiff's lien was subordinate because he had not completed his work before the others were recorded. Therein it erred. See 17 Cal.Jur., sec. 102, p. 155; Code Civ. Proc., sec. 1183.

Respondents defend the disallowance of any lien upon the sole ground that the work done by plaintiff was valueless to them. But the court did not so find; therefore plaintiff's lien was valid to the extent, at least, of the value of plaintiff's work under the contract.

[6–8] Appellant also contends that certain items in his cost bill were erroneously disallowed, to wit, the amount paid for preparation of his lien claim, the notary fee, and cost of recording same. Under Code of Civil Procedure, sec. 1195, plaintiff was entitled to recover the notary fee and the cost of recordation, but not expenditures for the preparation of the claim, the latter item being in the nature of an attorney's fee, not now allowable. 17 Cal. Jur., sec. 159, p. 222. Appellant also complains that he was not allowed an item of $35 paid for a title search. He cites no authority supporting him. Section 1195, supra, does not provide for such a charge as costs. See Moss v. Underwriters' Report, Inc., 12 Cal.2d 266, 274, 83 P.2d 503. The right to recover costs is purely statutory, and he who seeks to recover them must "put his finger on a statute which awards the same." Sime v. Hunter, 55 Cal.App. 157, 159, 202 P. 967, 968; Bond v. United Railroads of San Francisco, 20 Cal.App. 124, 127, 128 P. 786.

The judgment is reversed.

PEEK and THOMPSON, JJ., concur.

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95 Cal.App.2d 541

HALL v. HALL.

Civ. 17188.

District Court of Appeal, Second District, Division 2, California.

Jan. 11, 1950.

Filiation action by Leta Frances Hall, a minor, by her guardian ad litem, Frances M'Kelvey, against Robert A. Hall, also known as Bob Hall.

From an order of the Superior Court of Los Angeles County, Elmer D. Doyle, J., directing payment of support, costs, and counsel fees pendente lite, the defendant appealed.

The District Court of Appeal, Wilson, J., reversed the order, holding that, in absence of a finding that defendant was the father of plaintiff, defendant having denied paternity, the court was without jurisdiction to award plaintiff support, costs and counsel fees pendente lite.

1. Bastards 🔑65, 69

Upon hearing of an order to show cause why alleged father of an illegitimate child should not pay support, court costs and attorney's fees pending determination of the action, before he can be ordered to pay, plaintiff must prove by a preponderance of evidence that defendant is the father, and defendant must be given a hearing.

2. Bastards ⚷78

Proof of parentage is a jurisdictional prerequisite for an order to support an illegitimate child.

3. Court commissioners ⚷5

Where report of the commissioner to whom case is referred is simply a report of the evidence upon which his recommendation is based, and contains no findings of fact, it is insufficient to sustain a judgment or an order entered thereon. Code Civ. Proc. § 643.

4. Bastards ⚷78, 94

In filiation proceeding, where matter was referred to a commissioner for a hearing on order to show cause and for findings of fact, but the commissioner made no finding that defendant was the father of plaintiff, and that which was labeled as "findings" was but a recital of a part of the evidence, and defendant denied paternity, the court was without jurisdiction to award plaintiff support, costs, and counsel fees pendente lite. Code Civ. Proc. § 643.

Louis Elowitt, Los Angeles, for appellant.

No appearance for respondent.

WILSON, Justice.

From an order directing the payment of support, costs and counsel fees *pendente lite* in a filiation action, defendant appeals.

Defendant contends (1) that since there was no finding that he is the father of plaintiff, the court had no jurisdiction to order payment of support, costs and counsel fees *pendente lite* and (2) that there was no evidence or finding as to plaintiff's requirements for support or defendant's ability to pay.

This action was brought by an illegitimate child, through her guardian *ad litem*, for a judicial declaration of paternity and support. Defendant filed an answer denying he is the father of plaintiff. The trial court issued an order directing defendant to show cause why he should not pay support, court costs and attorney's fees pending determination of the action and the matter was referred to a commissioner for hearing on the order to show cause and for findings of fact. At the conclusion of the hearing the commissioner made the following "Special findings as to parties, income, resources and other material facts": "Plaintiff testified that she spent week-ends at Elsinore with the defendant on many occasions, especially during October, 1947, when, she claims, she became pregnant by the defendant. Defendant denied any intimacies but admitted that he asked plaintiff to come to his home in April 1948 to help take care of his invalid wife. He admitted that this was in response to a lovely friendship which he and plaintiff enjoyed, previously. He admitted owning in joing tenancy with his wife, 4 pieces of property; he is living in a home valued at about $12,000.00. The plaintiff is living in a room and paying $15.00 a week. She has been working at LaRue's and only receives tips." Since the plaintiff is the minor child it may be assumed that the "plaintiff" referred to in the commissioner's recital is Frances McKelvey, the mother and guardian *ad litem* of plaintiff.

Based upon the foregoing "findings" and the recommendation of the commissioner, the court awarded plaintiff $20 a week for support *pendente lite*, $200 attorney's fees and $15 costs.

[1,2] Upon the hearing of an order to show cause why the alleged father of an illegitimate child should not pay support, court costs and attorney's fees pending determination of the action, before he can be ordered to pay, plaintiff must prove by a preponderance of evidence that defendant is the father and defendant must be given an opportunity to be heard and to present his evidence. Proof of parentage is a jurisdictional prerequisite for an order to support an illegitimate child. Carbone v. Superior Court, 18 Cal.2d 768, 772, 117 P.2d 872, 136 A.L.R. 1260.

[3,4] A commissioner must report his findings in writing to the court and the facts found and conclusions of law must be separately stated. Code Civ.Proc. § 643. Upon the hearing of the order to show cause in the instant action the commissioner made no finding that defendant is the father of plaintiff. That which is labeled as

"findings" is but a recital of a part of the evidence. Where the report of the commissioner is simply a report of the evidence upon which his recommendation is based and contains no findings of fact it is insufficient to sustain a judgment or order rendered thereon. Lee Sack Sam v. Gray, 104 Cal. 243, 246, 38 P. 85. In the absence of a finding that defendant is the father of plaintiff, defendant having denied paternity, the court was without jurisdiction to award plaintiff support, costs and counsel fees *pendente lite.*

Similarly, there is little evidence and no finding relative to plaintiff's requirements for support and no finding as to defendant's ability to pay.

Order reversed.

MOORE, P. J., and McCOMB, J., concur

95 Cal.App.2d 486

PEOPLE v. ZABEL.

Cr. 2629.

District Court of Appeal, First District,
Division 2, California.
Jan. 4, 1950.

Otto W. Zabel was convicted in Superior Court of Contra Costa County, Homer W. Patterson, J., of a sex offense.

The District Court of Appeal, Dooling, J., affirmed the judgment, holding, inter alia, that evidence of acts of intimacy committed by defendant on his stepdaughters was admissible.

1. Criminal law 🔑371(1)

Evidence of commission of crimes similar to the crime charged, while ordinarily not admissible, may be admitted to prove intent where intent is an issue and the criminal intent is denied by defendant.

2. Criminal law 🔑371(9)

In prosecution for sex offense, testimony of stepdaughters of defendant to recurring acts of intimacy committed by defendant on their persons, and a written statement in which defendant acknowledged similar acts with his stepdaughters, was admissible to show intent with which defendant touched person of complaining witness, notwithstanding defendant did not in so many words deny criminal intent. Pen. Code, § 288.

3. Criminal law 🔑384

In prosecution for sex offense, testimony of a stepdaughter of defendant to acts of intimacy committed by defendant on her person two or more years before trial was properly admitted as not being too remote particularly where other stepdaughter of defendant testified to continuing intimacies committed upon her person by defendant up to the time of offense on complaining witness. Pen.Code, § 288.

4. Criminal law 🔑768(3)

In prosecution for sex offense, instruction that jury in criminal prosecution must agree to verdict, and verdict must be unanimous, was not objectionable as directing jury that they had duty to agree. Pen. Code, § 288.

5. Criminal law 🔑1173(2)

In prosecution for sex offense, failure to instruct that jury must agree on defendant's intent either of arousing, appealing to or gratifying the lusts or passions or sexual desires of defendant or those of the child, was not reversible error under the circumstances. Pen.Code, § 288.

6. Criminal law 🔑1038(3)

Defendant could not complain that no instruction on included offenses was given where such an instruction was not requested.

◆

Herman W. Mintz, Oakland, Richard C. Johnston, Richmond, for appellant.

Fred N. Howser, Attorney General, Clarence A. Linn, Deputy Attorney General, for respondent.

DOOLING, Justice.

Defendant was convicted by a jury of a violation of Penal Code section 288 alleged to have been committed upon the person of an eleven year old girl. The complaining witness testified that while she was sleeping in defendant's home with one of his stepdaughters defendant came into the room and placed his hand upon her genitals. Defendant denied this, his testimony being that he noticed the little girl uncovered and replaced the bed coverings over her without touching her body. On cross-examination defendant stated that he might have touched her shoulder in placing the covers over her. Later, on being shown a written statement previously given to the District Attorney, in which defendant had stated: "I was a little unsteady in my feet. I lost my balance. In putting my hand down to steady myself I came in contact with the * * * girl on her breast," he repeated: "I was a little unsteady on my feet and I might have touched her on the shoulder."

The tenor of defendant's testimony was that he might have touched the child's body but if he did so it was an accident and not done deliberately or with lustful intent. This opened the door to the evidence of which defendant complains on appeal. The people produced in rebuttal the two stepdaughters of defendant who testified to recurring acts of intimacy committed by defendant on their persons, and also introduced his written statement in which defendant acknowledged similar acts with his stepdaughters. The trial court admitted this evidence for the limited purpose of showing the intent with which defendant touched the person of the complaining witness if the jury found that he did so, and the jury was explicitly instructed on the limited purpose for which this evidence should be considered.

[1, 2] The evidence was properly admitted under the rule that evidence of similar crime, while ordinarily not admissible, may be admitted to prove intent where there is an issue and the criminal intent is denied by the defendant. People v. Williams, 6 Cal.2d 500, 58 P.2d 917; People v. Westek, 31 Cal.2d 469, 190 P.2d 9; People v. James, 40 Cal.App.2d 740, 105 P.2d 947; People v. Clapp, 67 Cal.App.2d 197, 153 P.2d 758; People v. Collins, 80 Cal.App.2d 526, 182 P.2d 585. That defendant did not deny criminal intent in so many words is not important since such denial was implicit in his claim that if he touched the child his doing so was accidental; and the only conceivable purpose of this testimony was to negative a criminal intent.

[3] The younger stepdaughter testified that defendant stopped his intimacies with her about two years before the trial. The question whether this evidence was too remote was primarily for the trial judge and we cannot hold its admission error, particularly in view of the fact that the other stepdaughter testified to continuing intimacies up to the time of the offense of which defendant was accused.

[4] The jury was instructed: "Under the law, in all criminal actions it is necessary that all jurors agree to such verdict. Therefore, your verdict in this case must be unanimous." The jury must be accorded the usual amount of common sense and common knowledge and cannot have understood from this instruction, as defendant contends, that they were being directed that it their duty to agree. Properly construed the instruction did no more than advise them of the rule that in a criminal case in order to bring in a verdict that verdict must be unanimous. The instruction did not contain the vice of the instruction criticized in People v. Watson, 165 Cal. 645, 654–655, 133 P. 298.

[5] We find no merit in the claim that the jury was not instructed that they must all agree on the defendant's intent either of "arousing, appealing to or gratifying the lusts or passions or sexual desires" of defendant or those of the child. No such instruction was requested and the inference is indisputable that if defendant committed the act with criminal intent he did it to gratify his own desires.

[6] No instruction on included offenses was requested and appellant is in no position to complain that none was given. People v. Dunlop, 79 Cal.App.2d 207, 210–211, 179 P.2d 658.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

95 Cal.App.2d 280

CHAMBERLAIN et al. v. WAKEFIELD et al.

Civ. No. 16916.

District Court of Appeal, Second District, Division 3, California.

Dec. 22, 1949.

C. L. Chamberlain and another sued Leon R. Wakefield and another on a note and thereafter included a cause of action for an alleged conspiracy on the part of defendants Wakefield and J. C. Landers and another to defraud plaintiffs. The defendants Wakefield filed a cross-complaint for rescission of a contract for sale of a lease or in the alternative for damages, alleging that the agreement was entered into as result of fraud.

The Superior Court for Los Angeles County, Arthur Crum, J., rendered a judgment for defendants and made an order denying a motion for a new trial, and from the judgment and the order plaintiffs appealed.

The District Court of Appeal, Wood, J., affirmed the judgment, dismissed the appeal from the order, and held that the evidence supported a finding of fraud on the part of plaintiffs and a finding that the lease and an interest in furniture sold to defendants Wakefield were of no value. The court also held that the defendants Wakefield were entitled to rescission and an accounting, and that defendants were not guilty of the conspiracy charged. The court further found that a failure to sign findings timely and the making of inconsistent findings were not ground for complaint on appeal.

1. Landlord and tenant 🔑79(1)

In cross-action by purchasers of hotel lease and furniture for rescission of contract of sale on ground of fraud, evidence supported findings to effect that vendors told purchasers that gross income averaged $2,750 per month, although gross income for year preceding sale averaged slightly in excess of $2,000 per month, and hence a finding of fraud by vendors was justified.

2. Landlord and tenant 🔑79(1)

In cross action by purchasers of hotel lease and furniture for rescission of contract of sale, evidence supported finding that purchasers relied upon misrepresentations of vendors with respect to income produced by the property.

3. Contracts 🔑94(5)

One who is induced to enter into a contract by positive representations of fact need not inquire as to truth of representations unless he is made aware of facts which bring them under suspicion and which would induce a prudent man to make inquiry; and a person can act upon the presumption that there exists no intention to defraud him.

4. Landlord and tenant 🔑79(1)

Where one of two prospective purchasers of hotel lease and furniture was a real estate broker familiar with buying, selling and leasing property, and examined premises, but vendors made positive statements regarding income and expenses of the business, purchasers were not required to inquire as to truth of representations.

5. Landlord and tenant 🔑79(1)

In purchasers' cross action to rescind contract of sale of hotel lease and furniture, evidence supported findings that neither lease nor furniture were of any value.

6. Landlord and tenant 🔑79(1)

Where assignees of hotel lease sold lease and furniture which were of no value, and thereafter owners of hotel began unlawful detainer action against purchasers and would not permit assignees to reoccupy the hotel because of non-payment of rent, purchasers would not be deprived of their remedy of rescission of contract of sale on ground of fraud merely because they could not restore possession to vendors.

7. Trial 🔑2

A motion to consolidate actions for trial is addressed to trial court's discretion.

8. Appeal and error 🔑1046(1)

Court's discretion in consolidating actions for trial will not be interfered with on appeal except where there has been an abuse.

9. Trial 🔑2

Where sellers brought action against buyers on note given on sale of furniture subject to chattel mortgage, and, mortgagee had begun foreclosure action naming buyers as defendants, but had not served notice on buyers, refusal to consolidate foreclosure action with action on the note was not an abuse of discretion.

10. Conspiracy 🔑19

In action by vendors of hotel lease against hotel owners, evidence was insufficient to establish an alleged conspiracy between owners of hotel and purchasers of lease to effect a forfeiture of the lease for purpose of defrauding vendors.

11. Equity 🔑38

Where equity has acquired jurisdiction for one purpose, it will retain jurisdiction to the final adjustment of all differences between parties arising from the cause of action presented.

12. Cancellation of Instruments 🔑57

Where purchasers of lease brought cross action for rescission of contract of sale on ground of fraud, and court found it was impracticable to decree restoration of possession to vendors, court could properly order an accounting, although complaint did not ask for such relief.

13. Courts 🔑18

A Superior Court of California which has jurisdiction of the person has power to compel a conveyance of land outside the state.

14. Cancellation of Instruments 🔑60

Upon failure of party before the court to convey land located out of the state in accordance with court order, Supreme Court of California had power to enforce order by directing clerk to execute the conveyance.

15. Trial 🔑393(1)

The statute providing that court "shall" not sign any findings prior to expiration of five days after service thereof is directory and not mandatory. Code Civ. Proc. § 634.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Shall".

16. Appeal and error 🔑1031(1)

Failure of trial court to sign findings prior to expiration of five days after service thereof would be disregarded on appeal in absence of showing of prejudice. Code Civ.Proc. § 634.

17. Appeal and error 🔑1033(7)

Where court made certain inconsistent findings by stating whether allegations in designated paragraphs of pleadings were true or not true, but such findings if they had been made in accordance with the evidence would not have been more favorable to appellants, appellants could not complain of inconsistencies on appeal.

Hanifin & Sease, Los Angeles, for appellants.

E. O. Leake and J. J. Leake, Los Angeles, for respondents Wakefield.

Archie G. Cope, Long Beach, for respondents Landers.

WOOD, Justice.

Plaintiffs, who are husband and wife, were lessees of the Oxford Hotel in San Pedro, and were owners of the furniture therein. The defendants Wakefield, who are brother and sister, purchased the lease and furniture from plaintiffs for $28,500; and at the time of the transaction, and in payment of said sum, they paid $5,000 in cash, transferred a $7,500 equity in a ranch in Oregon, and executed a promissory note for $16,000. Defendants Landers, who are husband and wife, were the owners of the hotel, and they consented in writing to the assignment of the lease by plaintiffs to the Wakefields.

Plaintiffs commenced this action against the Wakefields upon the promissory note; and later they amended the complaint to include an alleged cause of action for damages for alleged conspiracy, on the part of the Wakefields and the Landers, to defraud plaintiffs. Defendants Wakefield filed a cross-complaint for rescission or, in the alternative, for damages, and alleged that they were induced to enter into the agreement by reason of the false and fraudulent representations of plaintiffs.

The court found that the Wakefields were induced to enter into said contract of sale, and to pay the $5,000 and transfer the real property and execute the note, by reason of false and fraudulent statements and representations made by plaintiffs to defendants Wakefield, as follows: that the lease and furniture were of the reasonable value of $28,500; that the gross income for the past year had averaged $2,750 per month; that the net income had averaged $1,500 per month; that the net profit for the past year was $18,000. The court also found that the Wakefields, immediately upon ascertaining the falsity of said statements and representations, rescinded said transaction and offered to return to plaintiffs everything of value received by them; that plaintiffs refused such rescission and offer; that at the time of service of the notice of rescission the Wakefields were not in default under the terms of the lease, contract of sale, or the note. The court concluded that the Wakefields were entitled to have the rescission enforced.

The judgment was that plaintiffs deliver to the Wakefields a good and sufficient deed to the real property in Oregon; that the promissory note be and "is hereby cancelled"; that the contract of sale for the furniture entered into between plaintiffs and the Wakefields be cancelled; and that the Wakefields have judgment for $4,804.69 (that being the difference between the sum of $5,000 paid to plaintiffs by the Wakefields and a deduction of $195.31 to which the court determined plaintiffs were entitled after taking an accounting of the income and expenses of the hotel while it was in possession of the Wakefields and the income and expenses of the ranch while it was in possession of the plaintiffs). The judgment also provided that defendants Landers recover their costs from plaintiffs. Plaintiffs appeal from the judgment and from the order denying the motion for a new trial.

Appellants contend that the evidence does not support the finding of fraud; and that the evidence does not support the finding that the lease and plaintiffs' interest in the furniture were of no value.

In 1943 the defendants Landers leased the hotel (which had 56 rooms) to one Story for $750 per month, and the lease provided that it should not be assigned without the written consent of the lessors. About May 14, 1946, the plaintiffs became the owners of the lease by an assignment. Plaintiffs also purchased the furniture in the hotel, subject to a chattel mortgage which was held by the Landers as security for the performance of the covenants of the lease. Thereafter the plaintiffs placed a second mortgage on the furniture to secure the payment of a note, in the approximate amount of $5,800, to one Seagle.

About December, 1946, plaintiffs listed the lease and furniture for sale with a real estate broker in Los Angeles. About March 8, 1947, Mrs. Chamberlain informed the broker (with whom she had listed the lease and furniture for sale) that the gross income from the hotel was $2,750 per month, that the expense of operation was about $1,250, and the net income was about $1,550. The following day she signed the broker's listing card on which that information was written. It was also stated thereon that the selling price was $28,500. Thereafter, during March, 1947, Miss Wakefield, who at that time was a real estate broker in Seattle, went to the office of the real estate broker in Los Angeles and told him she was looking for a location in California. He told her about the Oxford Hotel, and gave her the information contained on the card above mentioned. Miss Wakefield then went to the hotel where she met Mrs. Chamberlain, and Mrs. Chamberlain told her "that she made from 2750 to 3500," on the hotel and "she had averaged around 3000,"—that "she would always net $1500 a month," and she "cleared $18,000 the first year she was in the business." Mrs. Chamberlain showed a book to Miss Wakefield which purportedly contained a record of the receipts and expenses of the hotel. That book, according to Miss Wakefield's testimony, was in the form of a tablet. The book also contained "totals" which showed that plaintiffs "averaged" about $100 a day. About April 4, 1947, Miss Wakefield told plaintiffs she could not go into the hotel business alone, but if her brother could sell his ranch in Oregon he "might go in" with her. Mrs. Chamberlain said they would take the ranch in "as a trade." Thereafter, Mr. Chamberlain went to Oregon to see the ranch and while there told Mr. Wakefield that the hotel "took in" from $2,650 to $3,500 per month.

On April 16, 1947, the Landers served upon plaintiffs a written notice of cancellation of the lease, which notice stated that it was given for the reason plaintiffs had not paid the rent for the current month, and had failed to keep the furniture, the equipment, and the hotel building in good repair and in a clean and sanitary condition. Mr. Landers testified that, in a conversation with plaintiff Mrs. Chamberlain a few days after the notice was served, she asked him if he would "please wait a few days" because she thought that she and her husband had a "deal" they could make; that she said that her husband was then in Oregon at a ranch which the prospective buyers wanted to trade "for the hotel." Mr. Landers also testified that he told Mrs. Chamberlain that he would do nothing further until Mr. Chamberlain returned and either accepted or rejected the ranch. Mr. Chamberlain returned to California, and plaintiffs' attorney prepared an agreement, dated April 21, 1947, whereby plaintiffs agreed to sell and the Wakefields agreed to buy, the lease and the furniture for $28,500, which agreement provided that said sum should be paid as follows: $5,000 cash, transfer of a $7,500 equity in the Oregon ranch, and execution of a note for $16,000. Miss Wakefield signed the agreement and the promissory note. Mr. Chamberlain then took those documents to Oregon where they were signed by Mr. Wakefield. Plaintiffs thereupon assigned their lease to the Wakefields. Mr. Landers consented to the assignment of the lease, and the plaintiffs paid him $1,000 and also paid the past due rent of $750. Miss Wakefield took possession of the premises on April 22, 1947, and Mr. Wakefield and his wife came to the hotel from Oregon about May 1, 1947.

On May 9, 1947, defendants Wakefield sent a written notice of rescission to plaintiffs in which notice they stated that they had been induced to enter into the transaction by fraudulent statements and representations on the part of plaintiffs, and they demanded the return of everything of value received by plaintiffs, and offered to return everything of value received by them in connection with the transaction. The plaintiffs refused to accept the offer of rescission. The Wakefields, subsequent to the service of the notice of rescission, made no payments on the note to plaintiffs and paid no rent to the Landers. On June 10, 1947, plaintiffs filed this action on the $16,000 note.

The plaintiffs operated the hotel 11½ months (from May 14, 1946, to April 22, 1947). The income tax return of the plaintiffs, covering the period from May 14 to December 31, 1946, showed that the gross income from the hotel during that time was approximately $2,000 per month. Three books of plaintiffs which pertained to the hotel income were received in evidence as defendants' exhibits E, F, and G. Mrs. Chamberlain testified that those three books were the only books which were kept by plaintiffs during the period they operated the hotel, and that they had no other records showing income from the hotel. While testifying, she referred to one of those books and stated that the total income from the hotel, during the part of 1947 when plaintiffs were in possession, was as follows: $2,443.50 in January; $2,166.25 in February; $2,139.50 in March; and $1,530 from April 1st to April 21st. Another book of plaintiffs, which was in the form of a tablet, was received in evidence as defendants' exhibit J. The entries therein were in Mrs. Chamberlain's handwriting, and they covered the 11½ months the Chamberlains operated the hotel. Those entries showed total receipts of approximately $3,000 for each month from July, 1946, to and including March, 1947, and the sum of $1,890 for the first 21 days in April, 1947. Mrs. Chamberlain testified, in attempting to explain why the monthly income as shown by exhibit J was greater than that shown by the three other books, that the amounts shown in exhibit J were not entirely for room rentals but represented money taken in for every purpose, including sums received from a dry cleaning agency, key deposits, tips and telephone charges. She testified further that she did not remember whether she showed that book (exhibit J) to Miss Wakefield—that she thought she "just laid them [the books] all out." She also testified as follows:

"Q. [By defense counsel]. And didn't you in connection with that [exhibit J] say, 'you see, I am averaging from 2750 to better than $3,000 a month gross in this hotel?' A. Counting the telephones, I said that was up to her, she could make more on the telephones."

Mrs. Chamberlain also testified that the entries in exhibit J were her "own personal memos," were "not meant for anyone else's eyes," and included income from another hotel in which she had an interest.

[1] In support of plaintiffs' (appellants') contention, above stated, that the evidence does not support the finding of fraud, they argue in effect that there was no evidence that plaintiffs told the Wakefields or represented to them that the gross income averaged $2,750 per month, or that the net income averaged $1,500 per month, or that the net profit for the past year was $18,000. As above shown, there was evidence that the plaintiff Mrs. Chamberlain had stated on the broker's listing card that the gross income was about $2,750 per month and the net income was about $1,550 per month; and that the broker had informed Miss Wakefield that those amounts of income had been stated on that card. Also there was evidence that Mrs. Chamberlain told Miss Wakefield that the income was from $2,750 to $3,500 per month, that she would net $1,500 per month, and that the net income for the year was $18,000. Mrs. Chamberlain exhibited to Miss Wakefield a book showing that the income averaged about $100 a day. Mr. Chamberlain told Mr. Wakefield that the income was from $2,650 to $3,500 per month. The evidence was sufficient to support said finding that the plaintiffs told the Wakefields that the gross income averaged $2,750 per month, that the net income averaged $1,500 per month, and that the net profit for the past year was $18,000. Also a further finding that the gross income, for the year preceding the sale "averaged slightly in excess of $2,000 per month" was supported by the evidence. The 1946 income tax return of plaintiffs, which included the first 7½ months of the 11½ months that plaintiffs operated the hotel, showed that the gross income was about $2,000 per month. Mrs. Chamberlain testified, by reference to one of the three books (exhibits E, F, and G), that the gross income for the period of time plaintiffs operated the hotel in 1947 (approximately 3¾ months) was $8,279.25 or an average of approximately $2,200 per month. It appears therefore that plaintiffs told the Wakefields that the average gross monthly income was much greater than it actually was. The trial judge might well have concluded from the evidence that the book which Mrs. Chamberlain exhibited to Miss Wakefield during the negotiations preceding the sale was exhibit J, which showed that the average monthly gross income for the 11½ months that plaintiffs operated the hotel was $3,000. The explanation, above mentioned, which Mrs. Chamberlain gave regarding exhibit J, to the effect that the larger monthly income shown therein included dry cleaning charges, key deposits, telephone charges, and income from another hotel, apparently was not accepted by the trial judge. Since Mrs. Chamberlain testified that the three other books (exhibits E, F, and G) were the only records showing the income, and since the entries in exhibit J were more in accord with the alleged representations of plaintiffs regarding the income, and since Mrs. Chamberlain testified that the entries in exhibit J were "not meant for anyone else's eyes," the trial judge might have inferred that exhibit J was a book of false

entries which Mrs. Chamberlain used to support her oral statements regarding the income. During the negotiations with the Wakefields the plaintiffs had been given notice of cancellation of their lease, and they had asked the Landers to delay the cancellation a few days so that plaintiffs might try to sell the lease. The evidence was sufficient to support the finding of fraud.

[2-4] Appellants assert that the Wakefields did not rely on the alleged misrepresentations. They argue that since Miss Wakefield was a real estate broker she was familiar with buying, selling and leasing property; that she examined the premises and was in a position to know or ascertain the facts. The court found that the Wakefields did rely upon said misrepresentations. That finding was supported by the evidence. The evidence shows that the plaintiffs made positive statements regarding the income and expenses. Those matters were facts within the knowledge of plaintiffs. "One who is induced to enter into a contract by positive representations of fact is under no duty to inquire as to the truth of the representations unless he is made aware of facts which bring them under suspicion and which would induce a prudent man to make inquiry." Mirich v. Underwriters at Lloyd's London, 64 Cal. App.2d 522, 531, 149 P.2d 19, 25. A person "can act upon the presumption that there exists no intention to defraud him." Anderson v. Thacher, 76 Cal.App.2d 50, at pages 70–71, 172 P.2d 533, at page 544. The circumstances here were not such that the Wakefields were required to inquire as to the truth of plaintiffs' representations.

[5] Appellants contend that the evidence does not support a finding by the trial court that the lease and plaintiffs' interest in the furniture were of no value. That part of the finding relating to the value of the lease was apparently based upon a further finding of the court that: for the year immediately preceding execution of the agreement, the gross income of the hotel "averaged slightly in excess of $2,000 per month," and after deduction of the expenses and "a reasonable allowance for wages" for the operation of the hotel there was no net income. Appellants argue that the sum which the court regarded as wages should have been treated as net income. Irrespective of whether such sum be treated as wages or as net income, it was not a gain which accrued on the capital investment. Appellants' records showed no allowance for compensation for the greater portion of the work performed in operating the hotel during the term of their lease. There was evidence that, except for the services of one employee who was paid $75 a month, most of the work was performed by plaintiffs and their son and his wife; and that neither plaintiffs nor the son and his wife received any salary during the entire period. There was also evidence that the total amount paid by plaintiffs in salaries during the period they operated the hotel, which was approximately 11½ months, was $987. Furthermore, the evidence shows that during this period plaintiffs expended little or nothing in upkeep and repair. The court therefore was justified in deducting reasonable compensation for necessary services rendered in the operation of the hotel in order to determine whether the lease had a value at the time it was transferred to the Wakefields. Appellants also seem to argue that the above finding, relating to gross and net income, was based upon the income and expenses of the hotel during the period it was operated by the Wakefields. It does not appear, however, that said finding was based upon such income and expenses. There was evidence, including testimony by Mrs. Chamberlain, that the gross income of the hotel during the period plaintiffs operated it averaged approximately $2,000 a month. In making its findings, the court had before it the records (exhibits E, F, and G), produced by plaintiffs, which Mrs. Chamberlain testified showed the entire income and expenses of the hotel during the period it was operated by plaintiffs. The evidence was sufficient to support the finding that the lease was of no value. As to that part of the finding relating to the furniture, there was evidence that plaintiffs had misrepresented the condition of the furniture and furnishings to the Wakefields. There

was evidence that the draperies were "all torn and the mattresses were practically all ruined"; that there were no window shades; that the rugs were in a "terrible" condition; that the linens were torn and mended; that when Mr. Landers took possession of the hotel on October 24, 1947, under the unlawful detainer judgment (which was six months after the Chamberlains left the hotel), "everything in the hotel was not worth more than $500"; and that he spent about $10,000 to replace some of the furniture and to redecorate part of the hotel. The trial judge said that the furniture was so inextricably mingled in the lease transaction that it had no value commercially. A hotel owner, who was called as a witness on behalf of plaintiffs, testified that the furniture without the lease "would not be worth anything practically," and that all of the furniture in all of the rooms put together "would not be worth over $4,000 or $5,000 out on the street." As above shown, the furniture was subject to a mortgage in favor of the Landers to secure the performance of the covenants of the lease; and it was also subject to a second mortgage to secure the payment of a note for $5,800 made by the Chamberlains and payable to one Seagle. The evidence was sufficient to support the finding that the plaintiffs' interest in the furniture was of no value.

[6] Appellants also contend that rescission was not a proper remedy under the circumstances of this case for the reason that the Wakefields did not make restoration of that which they received from plaintiffs. When the notice of rescission was given on May 9, 1947, the plaintiffs refused, as above stated, to accept the offer of rescission. On July 9, 1947, the Landers commenced an action against the Wakefields and the plaintiffs herein to foreclose the mortgage on the furniture. That action was still pending at the time the trial of the present action was commenced on January 22, 1948. On September 10, 1947, the Landers served a notice on the Wakefields and the plaintiffs wherein it was stated that those persons were required to pay the past due rent, or surrender possession of the premises within three days. No rental was paid subsequent to the service of said notice, and on September 15, 1947, the Landers commenced an action in unlawful detainer against the Wakefields. On October 21, 1947, the Landers obtained therein judgment for possession of the premises and for $3,750 past due rent. The Landers took possession of said premises about October 24, 1947. The Wakefields had occupied the premises from April 22, 1947, until that date. Appellants argue that the Wakefields could not restore possession to them for the reason that the Landers would not permit appellants to re-occupy the hotel. Even though the Wakefields could not restore possession to the appellants, they were not thereby deprived of the remedy of rescission. As above shown, there was nothing of value to restore. Under circumstances where nothing of value has been received, restoration is not a legal requirement. Esau v. Briggs, 89 Cal.App.2d 427, 436, 201 P.2d 25. See Simmons v. Cal. Institute of Technology, 34 Cal.2d 264, 209 P.2d 581.

[7-9] Appellants contend that the trial court erred in refusing plaintiffs' motion to consolidate the action to foreclose the mortgage on the furniture with the present action. Prior to the trial of this action counsel for plaintiffs made a motion to consolidate the actions, and the court denied the motion. The Wakefields were named as defendants in the foreclosure action but they had not been served therein at the time the motion was made. A motion to consolidate actions for trial is addressed to the discretion of the court, and its discretion will not be interfered with on appeal except where there has been an abuse of discretion. McArthur v. Shaffer, 59 Cal.App.2d 724, 727, 139 P.2d 959. There was no abuse of discretion in denying said motion.

[10] Appellants contend further that defendants Landers unjustifiably interfered with the performance of the contract by the Wakefields, and that there was a conspiracy between the Landers and the Wakefields to effect a forfeiture of the lease. Appellants argue that some of the circumstances which indicate such a con-

spiracy are: that the Landers refused to allow plaintiffs to retake possession; that defendant Landers resisted plaintiffs' motion to consolidate the actions; and that on one occasion the attorney for the Wakefields cross-examined a witness on a point which the court had previously ruled was hearsay. There was evidence that the Landers would not permit the plaintiffs to re-occupy the hotel because the Health Department had been "after" the Landers, while the plaintiffs were in possession, "as the place was dirty, filthy and they had a bunch of sporting women in there." The Landers were not parties to, and had no knowledge of, the misrepresentations which plaintiffs made when they sold the lease. The Landers were under no legal duty to accept the plaintiffs as tenants. This contention is not sustained.

[11, 12] Appellants further contend that an accounting was not proper in the present case and that the admission of evidence for an accounting was error. This contention is not sustainable. In Swan v. Talbot, 152 Cal. 142, 94 P. 238, 17 L.R.A.,N.S., 1066, the trial court adjudged that plaintiff was entitled to rescission of a bill of sale but it found that it was impracticable to decree restoration of the property, and it thereupon stated and settled an account between the parties. The Supreme Court, in affirming the judgment, said, 152 Cal. at page 147, 94 P. at page 240, that the "proceeding adopted by the court was wholly consonant with the principle that, where equity has acquired jurisdiction for one purpose, it will retain that jurisdiction to the final adjustment of all differences between the parties arising from the cause of action presented." Under this principle, the court may "properly order an accounting although the complaint did not ask for such relief." Sears v. Rule, 27 Cal.2d 131, 149, 163 P.2d 443, 452.

[13, 14] Appellants further contend that the court had no jurisdiction to direct, upon failure of plaintiffs to execute a conveyance of the land in Oregon within 10 days, that the clerk of the court execute such conveyance. A superior court of California which has jurisdiction of the person has the power to compel a conveyance of land outside the state. Tully v. Bailey, 46 Cal.App.2d 195, 198, 115 P.2d 542; Tomaier v. Tomaier, 23 Cal.2d 754, 760, 146 P.2d 905. "Such a decree does not operate directly upon the property nor affect the title. The decree is made effectual through the coercion of the parties by directing some action on their part or by enjoining them from doing a certain thing." Tully v. Bailey, supra, 46 Cal.App.2d at page 198, 115 P.2d at page 544. If the court has power to order a party to convey land outside the state, it follows that upon his failure to do so the court has power to enforce its order by directing the clerk to execute the conveyance.

[15, 16] Appellants contend further that it was error for the trial court to sign findings prior to the expiration of five days after service thereof. Section 634 of the Code of Civil Procedure provides, in part, that "the court shall not sign any findings therein prior to the expiration of five days after such service." That section is directory and not mandatory. Bradford v. Southern California Petroleum Corp., 62 Cal.App.2d 450, 463, 145 P.2d 36; Treat v. Superior Court, 7 Cal.2d 636, 639, 62 P.2d 147. In the absence of a showing of prejudice, failure to comply with that section will be disregarded on appeal. In re Estate of Rosland, 76 Cal.App.2d 709, 712, 173 P.2d 830.

[17] Appellants assert that there were certain inconsistencies in the findings. The court made certain findings by stating whether the allegations in certain designated paragraphs of the pleadings were true or not true. In making the findings under such method, it appears that, by reason of negative expressions in such references, the court found in effect that the hotel had not been leased to Mrs. Story. It was undisputed that the hotel had been leased to Mrs. Story. In making another finding by such reference method, the court in effect found that payments had been made upon the $16,000 note. It was stipulated that nothing had been paid on the note. It appears therefore that if those findings had been made in accordance with

the evidence they would not have been more favorable to appellants than the findings which were made. Other alleged inconsistencies in the findings do not merit discussion.

The judgment is affirmed. The appeal from the order denying the motion for a new trial is dismissed.

SHINN, P. J., and VALLÉE, J., concur.

95 Cal.App.2d 454

PEOPLE v. WASHINGTON et al.

Cr. 4374.

District Court of Appeal, Second District, Division 3, California.

Dec. 30, 1949.

Rehearing Denied Jan. 9, 1950.

Hearing Denied Jan. 26, 1950.

Kary M. Washington and Naomi Hunter in a trial by the Superior Court, Los Angeles County, Stanley N. Barnes, J., without a jury were adjudged guilty of violating Health and Safety Code in that they had unlawfully in their possession flowering tops and leaves of Indian hemp and defendant Washington appealed from order denying his motion for a new trial and from the order denying his application for probation.

The District Court of Appeal, Wood, J., held that as it was not clear from the reporter's transcript and the clerk's minutes, which were conflicting, that defendant Washington personally expressed in open court that he consented to a waiver of a trial by jury, the judgment as to defendant Washington and the order denying his motion for a new trial would be reversed and the case as to that defendant remanded and dismissed the attempted appeal from the order denying probation.

1. Jury 🔑29(6)

In order that a criminal case may be tried without a jury, it is necessary that the defendant personally express in open court that he consents to a waiver of a trial by jury and it is also necessary that the counsel for the defendant also express in open court that he consents to a waiver of a trial by jury. Const. art. 1, § 7.

2. Jury 🔑29(2)

Constitutional provision that a trial by jury may be waived in all criminal cases by the consent of both parties expressed in open court by the defendant and his counsel is to be strictly construed. Const. art. 1, § 7.

3. Criminal law 🔑1186(1)

Where reporter's transcript and clerk's minutes were conflicting as to whether the defendant personally expressed in open court that he consented to a waiver of a trial by jury and there was no statement in either of the official records and no circumstances appeared in the record on appeal from which it could be determined with reasonable certainty which of the two official records was erroneous, judgment of conviction as to defendant would be reversed and the case remanded as for a new trial. Const. art. 1, § 7.

4. Criminal law 🔑1023(12)

An order denying probation is not appealable.

Rayfield Lundy, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Norman Sokolow, Deputy Attorney General, for respondent.

WOOD, Justice.

Defendants Washington and Hunter were charged with the violation of section 11500 of the Health and Safety Code in that they unlawfully had in their possession flowering tops and leaves of Indian hemp. In a trial by the court without a jury they were adjudged guilty. Defendant Washington appeals from the judgment, from the order denying his motion for a new trial, and from the order denying his application for probation.

Appellant contends that he did not waive his right to a trial by jury.

Article I, section 7, of the Constitution of California, provides in part that "A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel * * *."

With reference to the alleged waiver of trial by jury, the reporter's transcript shows as follows:

"Mr. Broady [counsel for Washington]: The defendant Kary Washington is ready. The defendant Kary Washington wishes to waive his right to a trial by jury and submit it to the court.

"Mr. Hurd [deputy district attorney]: Do you waive, counsel?

"Mr. Zeman [counsel for Hunter]: We will waive, too, your Honor.

"The Court: Naomi Hunter, is that your true name?

"Defendant Hunter: Yes.

"Mr. Hurd: Do you desire to waive your right to a trial by jury and be tried by the Court?

"Defendant Hunter: Yes.

"Mr. Hurd: Do you waive, counsel?

"Mr. Zeman: I will waive.

"Mr. Hurd: The People join, your Honor."

The deputy district attorney and the counsel for both defendants then stipulated that the case might be submitted to the court upon the testimony taken at the preliminary examination; and that the People and the defendants might offer additional evidence.

[1, 2] It does not appear from the reporter's transcript that defendant Washington personally expressed in open court that he consented to a waiver of a trial by jury. In order that a criminal case may be tried without a jury, it is necessary that the defendant personally express in open court that he consents to a waiver of a trial by jury, and it is also necessary that the counsel for the defendant also express in open court that he consents to a waiver of a trial by jury. The provisions of said article I, section 7, of the Constitution are to be strictly construed, and "the decisions have consistently held that the accused must personally express consent to proceed without a jury." People v. Woods, 126 Cal.App. 158, 159, 14 P.2d 313.

The clerk's minutes show as follows: "Trial by jury is waived by the defendants and all counsel."

The reporter's transcript and the minutes are conflicting, and the question arises as to which of the two records is controlling in the matter of determining whether the defendant Washington personally expressed in open court that he waived a trial by jury. The answer to that question is to be determined from a consideration of the circumstances under which the proceedings were had. People v. Litchman, 17 Cal.App.2d 252, 256, 61 P.2d 1229; People v. Williams, 64 Cal.App. 144, 146, 220 P. 675; In re Evans, 70 Cal.App.2d 213, 216, 160 P.2d 551; People v. Bier, 59 Cal.App.2d 313, 317, 138 P.2d 738.

In the Litchman case, supra, the defendant was charged in count I with forgery of a $1,000 check; and in count II with forgery of a $47 check. According to the clerk's minutes the defendant pleaded guilty to count I. According to the reporter's transcript the defendant withdrew his plea of not guilty to count II and pleaded guilty to count II. Prior to pronouncing sentence, the judge stated that the defendant had pleaded guilty to one count of forgery. He sentenced the defendant "for the offense of forgery," without specifying the count as to which he was pronouncing sentence. Thereupon the clerk stated that defendant had pleaded guilty to count I. The attorney for defendant replied that defendant had pleaded guilty to count II. The judge relied upon the statement of the clerk that it was count I, and then, upon motion of the district attorney, he dismissed count II. Upon appeal therein it was held that the minutes were not controlling; and that the reporter's transcript, showing that defendant pleaded guilty to count II, was correct. The judgment therein was reversed.

In People v. Williams, supra, the trial judge instructed the jury that the evidence was insufficient to warrant a conviction, and he advised the jury to acquit the defendant. The jury disregarded the advice and found the defendant guilty. The defendant moved for a new trial upon the ground that the verdict was contrary to the law and the evidence. The reporter's transcript showed that, in ruling upon the motion for a new trial, the trial judge stated that the evidence was insufficient to justify the verdict, and that the new trial was granted on the ground that the verdict was contrary to the law and the evidence. The clerk's minutes showed that the new trial was granted on the ground the verdict was contrary to law. On appeal therein it was held that since the entire record showed that the issue before the trial court was the insufficiency of the evidence, the clerk's minutes were erroneous, and the reporter's transcript was controlling.

In the matter of In re Evans, supra, which was a habeas corpus proceeding, petitioner had been sentenced to the penitentiary upon an alleged plea of guilty of grand theft. The petitioner therein contended that he had not personally entered a plea of guilty. The clerk's minutes therein showed that the petitioner pleaded guilty. The reporter's transcript showed that the attorney for the petitioner said that the petitioner pleaded guilty. Just prior to sentencing the petitioner therein, the trial judge said, in reviewing the proceedings in the case, that the petitioner had personally entered a plea of guilty. At the time of the hearing in the habeas corpus proceeding in the District Court of Appeal, the district attorney testified that it was his recollection that defendant personally entered a plea of guilty. Also at that hearing, the attorney, who represented the petitioner at the time of the alleged plea, testified that he did not make the statement attributed to him in the reporter's transcript, but that the petitioner himself entered a plea of guilty. The court therein said 70 Cal.App. 2d at page 216, 160 P.2d 552: "[W]hether the recitals in the clerk's minutes should prevail as against contrary statements in the reporter's transcript, must depend upon the circumstances of each particular case." The court held that, under all of the circumstances, including the statement of the trial judge and the testimony of the district attorney and petitioner's attorney that petitioner had pleaded guilty, the clerk's minutes should prevail as against the reporter's transcript.

In the case of People v. Bier, supra, the defendant was charged with assault with intent to commit rape. The reporter's transcript showed that the defendant was found guilty of the offense charged in the information, to wit, attempt to commit rape. The clerk's minutes show that the defendant was found guilty as charged in the information. On appeal the court held that the reporter's transcript was erroneous, and that the clerk's transcript was correct.

[3] In the present case, admittedly four persons were making statements, at the beginning of the trial, on the subject of waiver of trial by jury. Those persons were the attorney for defendant Washington, the attorney for defendant Hunter, the defendant Hunter herself, and the deputy district attorney. The clerk was required to make a concise minute entry that would recite the ultimate fact as to whether each of five persons (the 2 attorneys, the 2 defendants, and the deputy district attorney) personally waived trial by jury. The clerk's minute entry is not a specific reference to each of the five persons, but it refers generally to "the defendants" and to "all counsel." That entry is in the nature of an interpretation or conclusion by the clerk as to the meaning and legal effect of the statements which were made regarding waiver of trial by jury. The reporter's transcript purports to be a report of all that was said on the subject of waiver of trial by jury. The official reporter certified that his transcript comprises a full, true and correct copy of the proceedings had and testimony taken in the matter of said case. The district attorney and the present counsel for appellant stipulated that the reporter's transcript is correct. The trial judge approved the transcript. Of course, it cannot be determined with certainty from the record here which of the two official records, regarding the alleged waiver of a jury trial by Washington, is correct. Under one view of the matter, the minute entry that "the defendants" waived trial by jury means that defendant Washington said that he

waived a trial by jury, and that the clerk heard Washington make that statement. Under another view, the clerk, in his endeavor to make a concise recital of the ultimate fact, might have assumed from the whole discussion of waiver of a jury by the several persons, and from the absence of protest by any one, that all the defendants and attorneys waived a trial by jury. Under another view, the clerk might have been of the opinion that the attorney for Washington could, and did, waive Washington's right to a trial by jury. Under another view, if Washington did say that he waived a trial by jury, the reporter might not have heard that statement.

[4] There is no statement in either of those official records (the minutes or the reporter's transcript), and no circumstances appear in the record on appeal, from which it can be determined with reasonable certainty which of the two official records is erroneous. Prior to the amendment of article I, section 7, of the Constitution in 1928, the right to a trial by jury in a felony case could not be waived. If a criminal case is to be tried without a jury it must be clear that the defendant personally has expressed in open court that he consents to a waiver of trial by jury. In People v. Spinato, 100 Cal.App. 600, at page 604, 280 P. 691, 693, it was said that where "the Constitution has prescribed the method and form of such waiver, it cannot be otherwise accomplished. Where, as here, an express consent is required, no implied consent will suffice." In People v. Garcia, 98 Cal.App. 702, at pages 704–705, 277 P. 747, 748, it was said: "Not only is the Constitution explicit as to the parties who may consent to waive a trial by jury, but it is equally definite as to the form in which the consent must be given, for the provision is that it must be 'expressed in open court.' Nothing could be more clear than this language." Under the circumstances in the present case it is not clear that the defendant Washington personally expressed in open court that he consented to a waiver of a trial by jury, and for that reason the judgment as to the defendant Washington and the order denying his motion for a new trial should be reversed, and the case as to said defendant should be remanded for a new trial.

"There is no appeal from an order denying probation." People v. Jackson, 89 Cal. App.2d 181, 182, 200 P.2d 204, 205.

The judgment and the order denying the motion for a new trial are reversed, and the case as to said defendant is remanded for a new trial. The attempted appeal from the order denying probation is dismissed.

SHINN, P. J., and VALLÉE, J., concur.

95 Cal.App.2d 398

BELL v. TOWNS et al.

Civ. 16722.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1949.

Rehearing Denied Jan. 13, 1950.
Hearing Denied Feb. 23, 1950.

Action by D. H. Bell against Annabell Towns, Catherine A. McKenna and another to quiet title to realty.

The Superior Court of Los Angeles County, Ben V. Curler, J., entered judgment for plaintiff and defendant Catherine A. McKenna appealed.

The District Court of Appeal, Wilson, J., held that appellant had not acquired title by adverse possession because of failure to pay taxes and that tax deeds to plaintiff's grantor were not void and affirmed the judgment.

1. Adverse possession 🔑86

Title to realty by adverse possession could not be acquired without the payment of all taxes levied on the property. Code Civ.Proc. § 325.

2. Taxation 🔑627

Where delinquent tax list covered all property in the county on which taxes had not been paid, references therein to taxes of the several cities named in delinquent tax notice applied only to taxes on property located in the respective cities and did not sustain contention that realty was advertised to be sold for taxes levied by a city other than that in which it was located so as to render tax deeds void.

3. Acknowledgment ⚷59

Where tax deeds were acknowledged before the county clerk by named person designated as deputy, it would be presumed from recital in the documents that he was a deputy county clerk qualified to take acknowledgments of deeds.

4. Officers ⚷30

The same person may act both as deputy county clerk and as deputy tax collector.

5. Taxation ⚷688

Publication of delinquent tax list other than by authority of tax collector, failure to attach certificate that it was published by his authority, absence of certificate that it was a copy of delinquent tax list for the year in question and fact that tax deeds were not in exact form prescribed by law and failed to recite therein that property was sold to highest bidder and that grantee made the highest bid constituted "procedural" and not "jurisdictional defects" and were cured by curative acts. Acts 1943, c. 458; Acts 1945, c. 1134.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Jurisdictional Defect" and "Procedural Defect".

6. Taxation ⚷788(3)

A tax deed to state is prima facie evidence of the regularity of certain of the tax proceedings and conclusive as to all other such proceedings from the levy of the assessment to the execution of deed. Revenue and Taxation Code, §§ 3517, 3518.

7. Taxation ⚷788(3)

Tax deed from state to an individual purchaser is conclusive evidence of the regularity of all proceedings, except as against actual fraud. Revenue and Taxation Code, § 3711.

8. Taxation ⚷788(1)

The legislature may make a tax deed conclusive evidence of compliance with all provisions of statute that are merely directory as to mode of procedure, but a deed cannot be made conclusive as to jurisdictional steps in tax proceedings.

9. Trial ⚷377(2)

Where memorandum opinion of trial judge in action to quiet title to realty ordered judgment for defendant on sole ground of failure to prove that grantee named in tax deeds from state upon which plaintiff's title rested was a corporation when deeds were executed, reopening case for introduction of further evidence after memorandum opinion had been filed was not abuse of discretion.

10. Trial ⚷377(2)

Failure to act on motion to reopen case for introduction of further evidence within 60 days after opinion ordering judgment had been filed did not deprive trial court of jurisdiction to grant motion, since it was not a motion for new trial and judgment had not been signed. Code Civ.Proc. § 660.

11. Taxation ⚷775

In action to quiet title to realty, where tax deeds on which plaintiff's title rested did not designate grantee as a corporation, a certified copy of articles of incorporation and testimony of officers that corporate franchise tax had been paid to date of trial and that they had purchased the realty at tax sale for and on behalf of grantee corporation was admissible to identify grantee named in deeds as a corporation organized under laws of California, etc.

12. Taxation ⚷775

Where corporate existence of grantee named in tax deeds and purchase of realty at tax sale for and on behalf of corporation were shown, proof that by-laws had been adopted, officers elected or stock issued was unnecessary to establish validity of tax deeds.

◆

Catherine A. McKenna, in pro per.

Nessen, Becker & Becker, Max Bergman, Los Angeles, for respondent.

WILSON, Justice.

Action to quiet title to Lots 384 and 385 of the Forthmann Tract in the city of Los Angeles, formerly in the city of Watts. Judgment was entered for plaintiff from which defendant Catherine A. McKenna appeals.

Plaintiff's title rests on tax deeds issued to the State of California after nonpayment of taxes of 1928 on Lot 384 and taxes of 1924 on Lot 385; deeds issued by the State of California in February, 1943, to Record Searching Title Company for both lots and a conveyance by that company to plaintiff.

Defendant has no record or documentary title to Lot 384. She claims title solely through adverse possession. She asserts title to Lot 385 by adverse possession together with a tax deed issued to A. M. Robinson in 1918 and mesne conveyances from him to defendant. In 1930 she enclosed the two lots with a fence and has ever since maintained it.

[1] 1. Defendant contends that the statute of limitations protects her against plaintiff's claim of title. Though she has been in possession of the property since 1930 there is no evidence that she has paid any taxes on it. The contrary is attested by the fact that both lots were sold to the State for nonpayment of taxes and conveyed by the State to Record Searching Title Company in 1943. Title by adverse possession cannot be obtained without the payment of all taxes levied on the property. Code Civ.Proc. sec. 325.

[2] 2. Defendant asserts that the tax deeds to Record Searching Title Company are void for the reason that the property was advertised to be sold for taxes levied by the city of Venice when in fact it was in the city of Watts. This would be important if true, but the tax records in evidence describe the lots as being in the city of Watts. The delinquent tax list is not in the record but a sufficient amount of it was read into the transcript to show that it covered all property in the county on which taxes had not been paid, including that in the cities of Venice, Watts and other municipalities which had authorized the county to assess and collect their taxes. References to taxes of the several cities named in the delinquent tax notice obviously are applicable only to taxes on property that was then in the respective cities and not to any other property.

[3, 4] 3. Defendant contends that the deeds are void for the reason that they were not acknowledged before an officer qualified to take acknowledgments of deeds, the assertion in her brief being that they were acknowledged before B. F. Murphy who was a deputy tax collector. The deeds in evidence were acknowledged before the County Clerk by F. B. Murphy deputy. It will be presumed from the recital in the document that he was a deputy county clerk. There is no evidence that he was a deputy tax collector, and if he had been such there is no legal impediment to his acting as a deputy in both offices.

[5] 4. The other contentions of defendant as to the alleged invalidity of the tax deeds may be considered together: (a) That there is no affidavit or certificate attached to the published delinquent tax list for the year of the sale to the State that it was published by authority of the tax collector; (b) that it was not in fact published by his authority; (c) that there is no certificate that it is a copy of the delinquent tax list for the year in question; (d) that the tax deeds are not in the exact form prescribed by law; (e) that the deeds to Record Searching Title Company are void for failure to recite therein that the property was sold to the highest bidder and that the company was the party which made the highest bid. None of these alleged procedural errors or defects, if any in fact exists, is jurisdictional. If any occurred it is such as has been cured by the Curative Acts. Stats.1943, ch. 458, p. 1993; stats. 1945, ch. 1134, p. 2176.

[6, 7] A tax deed to the State is prima facie evidence of the regularity of certain of the tax proceedings and conclusive as to all others from the levy of the assessment to the execution of the deed. Pol. Code, secs. 3786, 3787, in effect when the deeds to the State were issued; now Rev. & Tax Code, secs. 3517, 3518. Except as against actual fraud, the deed from the State to an individual purchaser is con-

clusive evidence of the regularity of all proceedings. Pol.Code, sec. 3836.1, now Rev. & Tax. Code, sec. 3711.

[8] The Legislature may make a tax deed conclusive evidence of compliance with all provisions of the statute that are merely directory as to mode of procedure, but such an act cannot make a deed conclusive as to jurisdictional steps in the tax proceedings. Ramish v. Hartwell, 126 Cal. 443, 448, 58 P. 920. There is no evidence in the instant case of any error or omission as to jurisdictional steps leading to assessment, sale or conveyance to or by the State of the property in question.

[9, 10] 5. Defendant assigns as error the reopening of the case after judgment had been ordered but not filed or entered. After evidence had been offered by both parties and the case closed the court filed a memorandum opinion ordering judgment for defendant on the sole ground that there had been no proof that Record Searching Title Company, grantee named in the tax deeds upon which plaintiff's title rests, was a corporation when the deeds were executed by the county tax collector. Plaintiff then moved to reopen the case for the introduction of further evidence. The time for hearing the motion was not set forth in the notice but the clerk set it for hearing and notified both parties of the date; both appeared and argued the question of reopening without objection to the absence from the notice of the date of hearing, the only objection by defendant being to the jurisdiction of the court to hear or grant the motion. The order granting the motion was within the discretion of the court and we find no abuse of discretion. Defendant apparently mistaking the motion to reopen for a motion for a new trial contends that the court lost jurisdiction to grant it for the reason that it was not acted upon within sixty days after the opinion ordering judgment had been filed. Since (1) it was not a motion for a new trial, and (2) the judgment had not been signed, the sixty-day limitation, Code Civ.Proc. sec. 660, does not apply.

[11, 12] 6. Finally defendant contends that the court erred in admitting evidence of the corporate existence of Record Searching Title Company and oral evidence concerning the purchase of the property at the tax sale. The tax deeds to the company did not designate the grantee as a corporation. When the case was reopened a certified copy of the articles of incorporation was offered and received in evidence together with testimony of the officers of the corporation to the effect that its corporate franchise tax had been paid to date of trial; that they had bought the property at the tax sale for and on behalf of the corporation. Such evidence was admissible (1) to identify Record Searching Title Company, named as grantee in the tax deed, as a corporation; (2) to prove that the grantee is a corporation organized under the laws of California; (3) to show that the official address of the corporation is the same as that given for the forwarding of the deeds; (4) to prove that the corporation had possession of the deeds. It was not necessary to prove that bylaws had been adopted, officers elected, or stock issued.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

95 Cal.App.2d 518

FRUGOLI v. CONWAY.

Civ. 14225.

District Court of Appeal, First District,
Division 2, California.
Jan. 10, 1950.

Guido Frugoli sued Dulcie Conway to foreclose a mechanic's lien for labor and materials furnished defendant.

The Superior Court of Monterey County, H. G. Jorgensen, J., rendered judgment for plaintiff and defendant appealed.

The District Court of Appeal, Nourse, P. J., affirmed, holding that plaintiff was an employee of defendant and not an independent contractor.

1. Mechanics' liens ⚿281(1)

In action to foreclose a mechanic's lien for labor and materials furnished in construction of building on defendant's premises, evidence warranted finding that plaintiff was supervisor of labor as employee of defendant at a fixed wage but not an independent contractor. Business and Professions Code, § 7000 et seq.

2. Appeal and error ⚿1010(1)
Master and servant ⚿5

Question whether one is an independant contractor or employee is largely one of fact depending on all circumstances of the relation of the parties and when those circumstances disclose a mixed relation of employment, finding of trial court based on substantial and competent evidence cannot be disturbed.

◆

Mandl & Atteridge, Salinas, for appellant.

Kalmen Y. Sapero, Monterey, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to foreclose a mechanic's lien for labor and materials furnished defendant in the construction of a building on defendant's premises. He had judgment based on the reasonable value for $1,495.59.

The controlling issue involved on the appeal is whether plaintiff was an independent contractor or an employee. Appellant does not dispute that the labor and materials were furnished or that their reasonable value was the amount contained in the judgment. Otherwise the facts are disputed in all particulars and our recital is based on the evidence most favorable to respondent and which was accepted as true by the trial court.

It is conceded by respondent that he was not a general building contractor and was not licensed as such under the terms of the Business and Professions Code. It is his contention that, as an employee of appellant, he undertook for a fixed wage to supervise the construction of the building and, on appellant's request, furnished the labor and materials used in the construction. Respondent fully performed his part of the contract and the building was completed under the direction and control of appellant.

Appellant applied for and obtained a building permit in which she was designated as "Builder" and "Owner." She directed respondent to get the necessary labor and materials, which he did. She promised to pay him $400 for his services, He received no profit from the materials he purchased for her, though some were purchased on a "builders" discount, of which appellant had the benefit. Appellant carried the workmen's compensation on the job, and respondent handled the social security withholding taxes. The contract first contemplated a building of 800 square feet. Appellant increased this to approximately 1500 square feet by directing respondent to construct a bedroom and a bathroom on the outside, and other minor changes in the original plans. She directed the installation of the plumbing at an additional cost. She insisted upon a change in the type of shingles for the roof and now complains that they were unsatisfactory. She directed and controlled the laborers on the job and discharged two of them because they did not follow her orders.

On this evidence the trial court found: "That within the year preceding July 17, 1948, the date of commencement of the above entitled action, plaintiff was supervisor of labor thereon, as employee of said defendant at a fixed wage, to wit $400.00 performed services and furnished materials consisting of lumber, sand, cement, gravel, composition roof, shingles, door and windows, which work and materials were used in and upon and in connection with the work of improvement of the real property above described, consisting principally in the construction of a building; that the reasonable value of such work and materials at the time of the performance and furnishing thereof was the amount of $1495.59."

[1, 2] There is ample evidence to support this finding, the pertinent portion of which is that respondent "was supervisor of labor thereon, as employee of said defendant at a fixed wage." The question

whether one is an independent contractor or an employee is largely one of fact depending on all the circumstances of the relations of the parties. When those circumstances disclose a mixed relation of employment, the finding of the trial court based on substantial and competent evidence cannot be disturbed.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

HOWARD GREER CUSTOM ORIGINALS v. CAPRITTI et al.

Civ. 17036.

District Court of Appeal Second District, Division 1, California.

Dec. 29, 1949.

As Modified on Denial of Rehearing Jan. 16, 1950.

Hearing Granted Feb. 23, 1950.*

Howard Greer Custom Originals, a corporation, sued J. C. Capritti, doing business under the fictitious firm name and style of Rose Marie of California, and other fictitious defendants, individually, and as co-partners doing business under the name of Red and Brown Company, a co-partnership, and Rose Marie of California, Inc., sued as Black and White Company, a corporation, for claim and delivery, conversion and damages for breach of contract, and the corporate defendant filed a counterclaim.

The Superior Court of the County of Los Angeles, Stanley N. Barnes, J., denied a motion of defendant Capritti to set aside default judgment entered against defendant Capritti, and defendant Capritti appealed.

The District Court of Appeal, Drapeau, J., reversed the order, holding that the order was appealable and that it should be reversed since the ends of justice would be better served if defendant Capritti had opportunity to present claimed defense.

For prior opinion see 210 P.2d 24.

1. Appeal and error 🔑113(1)

An order denying proper motion under statute to set aside a judgment as taken through mistake, inadvertence, surprise or excusable neglect was appealable. Code Civ.Proc. § 473.

2. Judgments 🔑139

In passing upon motion to set aside default judgment, trial court must exercise a sound and legal discretion in such a manner as to conform with the spirit of the law by subserving and not impeding or defeating the ends of substantial justice.

3. Judgments 🔑363

The statute authorizing trial court to relieve party from judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, is remedial and is to be liberally construed so as to dispose of cases upon their substantial merits, and to give to the party claiming in good faith to have a substantial defense, an opportunity to present it. Code Civ.Proc. § 473.

4. Appeal and error 🔑957(1)

District court on appeal must abide by ruling of trial court denying motion to set aside a default judgment, made under statute authorizing trial court to relieve party from judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, unless it is satisfied that in denying the motion trial court was guilty of an abuse of discretion. Code Civ.Proc. § 473.

5. Appeal and error 🔑991

On appeal from an order made on affidavits, involving the decision of a question of fact, appellate court is bound by the same rule that controls it where oral testimony is presented for review, and if there is conflict in the affidavits, those in favor of prevailing party must be taken as true, and facts stated therein must be considered established.

6. Appeal and error 🔑957(1)

Where individual defendant claimed to have a meritorious defense, and individual defendant believed upon advice of counsel that answer filed by corporate defendant was sufficient and that he was not required to answer, and ends of justice would be better served if he had opportunity to present claimed defense, order denying individual defendant's motion to set aside default judgment entered against defendant, made under statute authorizing trial court to relieve party from judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, would be reversed on appeal. Code Civ. Proc. § 473.

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* Subsequent opinion 221 P.2d 937.

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Geo. W. Rochester, Los Angeles, for appellant.

Abraham Gottfried, Los Angeles, for respondent.

DRAPEAU, Justice.

This is an appeal from an order denying a motion of defendant Capritti made under section 473, Code of Civil Procedure to set aside a default judgment.

It appears from the record herein that on March 19, 1948, respondent corporation sued J. C. Capritti doing business as Rose Marie of California, and other fictitious defendants, for claim and delivery, conversion and damages for breach of contract, and on April 1, 1948, filed its amended complaint based on contract. On the latter date writ of attachment issued against the personal property of defendant Capritti, hereinafter referred to as appellant. Undertaking to discharge such attachment was filed on behalf of appellant in his individual capacity on April 23rd.

Thereafter, on May 7th, the answer and cross-complaint of Rose Marie of California, Inc., sued as Black and White Company, a corporation, were filed, and on the following day summons on the amended complaint was filed showing proof of service thereof on appellant as of April 26th. Demurrers to the answer and the cross-complaint were interposed and sustained on May 20th and defendant was given fifteen days to amend.

In the meanwhile, on May 17, 1948, upon request of respondent the default of appellant was entered by the Clerk.

Thereafter, on June 24th, Rose Marie of California, Inc., filed its petition in bankruptcy and E. A. Lynch was appointed receiver.

On July 21st, appellant in his individual capacity filed an answer to the amended complaint in which he alleged that he did not at any time "do business under the fictitious name and style of Rose Marie of California, but was employed by Rose Marie of California, a corporation organized and existing under the laws of the State of California, as an employee having no other business nor entering into any agreements, contracts or understandings of any kind whatsoever, save and except within the capacity of his employment with the said Rose Marie of California, Inc."

On July 22nd counsel for appellant filed and served notice of motion to set aside the default, supported by appellant's affidavit averring that an answer to the amended complaint having been filed on behalf of Rose Marie of California, a corporation, "affiant was under the impression that this would be sufficient and that there was no need for affiant to file an answer in his individual and personal capacity"; that when informed that a default had been entered against him, he conferred with counsel for the corporation, who prepared and filed an answer in his behalf on July 21st.

The default and appellant's motion to set it aside were heard jointly on July 29, 1948, resulting in a denial of the motion and the granting of a default judgment against appellant.

No appeal was taken from such judgment which was entered on August 3rd, but on August 5th, appellant served and filed his notice of motion under section 473, Code of Civil Procedure, to set such judgment aside, and for permission to file his proposed answer to the amended complaint, such motion being supported by affidavits of appellant, his counsel and others, all to the effect that appellant had a meritorious defense to the action, to-wit: that he had been employed as manager of the plant owned and operated by Rose Marie of California, Inc., and at no time had done business under the fictitious name and style of Rose Marie of California.

By reason of a filed alternative writ of prohibition, which was subsequently discharged, said motion went off calendar, but was later restored to calendar for hearing on October 21st, when the matter was submitted; and was denied on November 1, 1948. This appeal followed.

Appellant here contends that the denial of his motion to set aside the default judgment was an abuse of discretion which deprived him of his day in court and the opportunity to present a meritorious defense.

At the outset respondent urges the dismissal of this appeal on the grounds (1) the order of November 1st is non-appealable; (2) a motion to set aside a default judgment must be denied where a motion to set aside the entry of default has been previously denied.

[1] A motion to dismiss made upon practically the same grounds has been denied by this court during the pendency of this appeal. Moreover, it was held in Swan v. Riverbank Canning Co., 81 Cal.App.2d 555, 557, 184 P.2d 686, 687. "That an order denying a proper motion under section 473, Code of Civil Procedure, is appealable, seems to be settled. See Winslow v. Harold G. Ferguson Corp., 25 Cal.2d 274, 282, 153 P.2d 714; Funk v. Campbell, 15 Cal.2d 250, 251, 100 P.2d 762; In re Yoder, 199 Cal. 699, 702, 251 P. 205; Huffaker v. Decker, 77 Cal.App.2d 383, 386, 175 P.2d 254."

In the Winslow case, supra, it was held: "In those cases *where the law makes express provision for a motion to vacate*—as under sections 473, 473a and 663, 663a of the Code of Civil Procedure—an order denying such motion is regarded as a 'special order made after final judgment' and as such is appealable under section 963, subdivision 2, of the Code of Civil Procedure. California Delta Farms v. Chinese American Farms, 201 Cal. 201, 255 P. 1097; Funk v. Campbell, 15 Cal.2d 250, 100 P.2d 762." [25 Cal.2d 274, 153 P.2d 718] (Emphasis included.)

[2, 3] The general rules applying to motions such as the one here under review are well stated in Toon v. Pickwick Stages, Inc., 66 Cal.App. 450, 453, 226 P. 628, 629: "The legal principles by which courts are guided in considering motions to set aside defaults are well established and are comparatively simple. The trial court is to exercise a sound and legal discretion in passing upon the application. This discretion is not capricious or arbitrary, but it is an impartial discretion, and is to be exercised in such a manner as to conform with the spirit of the law by subserving and not impeding or defeating the ends of substantial justice. Waite v. Southern Pac. Co. [192 Cal. 467], 221 P. 204. 'Section 473,' says the court in Nicoll v. Weldon, 130 Cal. [666], 667, 63 P. [63], 64, 'is a remedial provision, and is to be liberally construed so as to dispose of cases upon their substantial merits, and to give to the party claiming in good faith to have a substantial defense to the action an opportunity to present it. * * * It is for this reason that we more readily listen to an appeal from an order refusing to set aside a default, than where the motion has been granted, since in such case the defendant may be deprived of a substantial right, where as it may be assumed, if nothing to the contrary is shown, that the plaintiff will be able at any time to establish his cause of action. If, for any reason, he will be unable to do so, that fact should be made to appear; but if he is merely subjected to delay or inconvenience by having the default set aside, he can be compensated therefor by the terms which the court may impose as the condition of granting the motion.' See, also, Brasher v. White, 53 Cal.App. 545, 200 P. 657."

Again, in Kent v. County Fire Ins. Co., 27 Cal.App.2d 340, 341, 80 P.2d 1019, it is stated: "The purpose of section 473 of the Code of Civil Procedure is remedial. It should be liberally construed so as to dispose of cases upon their substantive merits and give the party claiming in good faith to have a meritorious right, an opportunity to present it. Because of this the reviewing courts will scan more closely orders denying relief and are more prone to reverse orders of denial. They look with disfavor upon a party, who, regardless of the merits of his case, attempts to take advantage of mistake, surprise and inadvertence of his adversary. Brill v. Fox, 211 Cal. 739, 743, 297 P. 25."

However, the foregoing is qualified somewhat by the following statement appearing in 14 Cal.Jur. 1078, sec. 116: "But notwithstanding statements by the supreme court to the effect that the discretion is better exercised when it tends to bring about a decision on the merits, the rule not to disturb the trial court's action except in a clear case of abuse of discretion 'has never been relaxed'; such statements 'have been in the nature of advice' to the court below and not a compulsion to act in the manner suggested. (Citation of authorities.)"

[4] No doubt has been raised as to the propriety of the instant motion. And the "question here is the one that was before the [trial] court on the motion to vacate the judgment, namely, whether appellant made a sufficient showing for relief under section 473, Code of Civil Procedure, although we are, of course, under a duty to abide by the ruling of the trial court unless we are satisfied that in denying the motion the court was guilty of an abuse of discretion." Nicholson v. Nicholson, 85 Cal.App.2d 506, 508, 193 P.2d 112, 113.

[5] In the late case of Mann v. Pacific Greyhound Lines, 92 Cal.App.2d 439, 207 P.2d 105, 108, in discussing a motion made pursuant to section 473, supra, it was said: "The problem presented to the trial court on the motion was whether plaintiffs were entitled to relief from the judgment of dismissal because of their 'mistake, inadvertence, surprise or excusable neglect.' That problem was presented on affidavits, and it is definitely settled that 'In the consideration of an appeal from an order made on affidavits, involving the decision of a question of fact, the appellate court is bound by the same rule that controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered established.' 1 Cal.Jur. p. 681; 2 Cal.Jur. p. 932."

Turning to the affidavits filed in support of the instant motion, (1) that of appellant averred, among other things, that Rose Marie of California, Inc., was incorporated on September 25, 1947; that on October 1st, affiant was employed by such corporation as manager of its manufacturing plant; that when on March 26, 1948 he was served with summons and complaint directed against him as J. C. Capritti doing business as Rose Marie of California, he was instructed "by said corporation to confer with its attorney, Geo. W. Rochester, Esq., in regard to defense"; that affiant filed an answer on behalf of the corporation and "was under the impression that this would be sufficient as the said corporation's attorney assured him that the plaintiff and plaintiff's counsel understood the situation." That on June 24th, the corporation filed a petition in bankruptcy, and affiant filed a claim in that proceeding for wages due him. Further, that he fully and fairly stated all the facts in the case to his counsel, Mr. Rochester, and "is advised by said counsel and he verily believes that he has a valid and meritorious defense to the within action upon the merits."

(2) The affidavit of Mr. George W. Rochester, counsel for the corporation, avers that "on or about the middle of July, 1948, he became the attorney for J. C. Capritti"; that about April 21, 1948, one Dragna, Secretary-Treasurer of Rose Marie of California, Inc., a corporation, showed affiant the complaint and amended complaint filed in the within action which had been served on the president thereof about March 26 and April 1, 1948, respectively; that at the hearing of May 20th on the demurrers to the answer and cross-complaint of respondent corporation, it was stated in the presence of respondent's attorney, Mr. Abraham Gottfried, "that his suit was intended to be against Rose Marie of California, Inc., a corporation, inasmuch as there was no J. C. Capritti doing business under the fictitious name and style of Rose Marie of California." That after imparting such information to said attorney, "affiant was under the impression * * * that the amended answer and amended cross-complaint would suffice for

the purposes of getting the causes of action at issue." That thereafter said Mr. Gottfried interposed demurrers to the amended answer and amended cross-complaint "setting up hyper-technical objections to the pleadings, one of them being 'whether Rose Marie of California, Inc. is a defendant herein, and if so, for which of the named defendants it is appearing', he, Abraham Gottfried, knowing full well the factual situation and that Rose Marie of California, Inc., answered the complaint for the reason that there was no such legal entity as J. C. Capritti doing business under the fictitious firm name and style of Rose Marie of California." That hearing on the demurrers was set for June 24, 1948, and continued by stipulation between affiant and Mr. Gottfried to July 1, 1948; that on June 24, 1948, affiant advised Mr. Gottfried that Rose Marie of California, Inc. had filed a petition in bankruptcy and that therefore the action would have to be defended and tried by the attorney for the receiver. Further, affiant averred that early in July of 1948, a deputy county clerk telephoned him and said that Mr. Gottfried had requested from her "a setting for trial of a default taken against J. C. Capritti doing business under the fictitious firm name and style of Rose Marie of California"; whereupon he talked to Mr. Gottfried and told him in substance that, after the implied understanding between them, for Mr. Gottfried to "now try to 'pull the sneak' was indeed a surprise to affiant, but that if he wanted J. C. Capritti to file an answer, contrary to our mutual understanding, of course, affiant would try and get hold of Mr. J. C. Capritti and file the answer. Said Abraham Gottfried over the telephone then stated to affiant that an answer should be filed for J. C. Capritti in his personal capacity, whereupon affiant assured Abraham Gottfried that the answer from J. C. Capritti would be filed"; that such answer was filed on July 21, 1948, and on that very afternoon affiant received notification that a default trial had been set for "J. C. Capritti dba Rose Marie of California" on July 29, 1948; that he thereupon had his motion to set aside such default set for hearing on the same day, at which time it was denied; that he thereafter made the instant motion under sec. 473, C.C.P. to set aside the "default judgment on file herein, by reason of 'inadvertence, surprise or mistake', caused by affiant's reliance upon his understanding with Abraham Gottfried, a member of the Bar of California * * *"

The several other affidavits made in support of the motion contained averments with respect to the defense which it was proposed to present. No allegations were made touching upon the elements of "inadvertence, surprise, mistake or excusable neglect" necessary to be shown in order to prevail under section 473, supra.

In opposition to the motion, respondent's counsel, Mr. Gottfried, filed his affidavit in which he averred, among other things, that on March 2, 3, 4, 8, 9, 10, 11, 18, 24, April 21 and 26, 1948, he had numerous conversations with appellant and the various attorneys representing him, to-wit: Harry M. Umann, Esq., of the firm of Altagen, Rubin & Umann; Bernard S. Selber, Esq., and George W. Rochester, Esq., and at no time during such conversations did any of the attorneys or appellant advise affiant or his client that appellant was not the owner of the business and that same was owned by a corporation; that to the contrary, Mr. Umann specifically advised affiant that he represented appellant personally; that the day before respondent's complaint was filed, affiant together with the president and secretary of respondent corporation visited the place of business of appellant, at which time the latter stated that he was the owner of the business, Rose Marie of California; that on March 19th, affiant filed the original complaint herein and attached the bank account of appellant dba Rose Marie of California; that on March 24th Mr. Umann telephoned affiant that he "would enter an appearance for Mr. J. C. Capritti" requesting that affiant furnish him a copy of the summons and complaint, which was done. Affiant then averred upon information and belief that when service of summons and complaint was made upon appellant, that the latter conferred with Mr. Umann, who advised that a personal appearance would have to be made for appellant; that appellant thereupon instructed Mr. Umann to turn over the files in the case to Mr. Rochester; that among these files "affiant is informed and believes, was the original complaint and summons, together with correspondence showing that Mr. Capritti dealt with plaintiff in his individual capacity."

It is further averred that on May 6th, Mr. Rochester filed an answer on behalf of Rose Marie of California, Inc. Also that appellant, as well as his attorneys, "knew at all times that he was sued in his individual capacity and that the same is evidenced by the fact that his undertaking to release the attachment was given for Mr. Capritti only, and that as a result of such undertaking, the Sheriff released the property held under attachment." That he is now informed that the corporation is a bankrupt, and "that the present action on the part of J. C. Capritti is an attempt to avoid liability and to saddle a bankrupt corporation with his responsibilities." That Mr. Rochester was representing appellant in his individual capacity long before July, 1948, may be seen by his letter dated May 24, 1948, addressed to affiant, a copy of which is attached to the affidavit. Affiant also denied that he had any understanding with Mr. Rochester that the action was intended to be against the corporation and not against appellant; or that the amended answer and cross-complaint would suffice for the purpose of getting the causes of action at issue. Further, that affiant at all times told Mr. Rochester that he was not interested in any corporation, but was interested only in appellant, individually; that affiant made no statement, representation or indication to Mr. Rochester to the contrary; that Mr. Rochester knew that appellant was the real party in interest and on May 6th when he entered the appearance of Rose Marie of California, Inc., he also knew or had reason to believe that the corporation was insolvent and was contemplating bankruptcy.

The affidavits of the president and secretary respectively of respondent corporation in opposition to the motion were to the effect that at no time did appellant state that he was not personally responsible under the contract which forms the basis of the instant action; or that it was not made between respondent and appellant personally; or that appellant represented a corporation, but to the contrary, appellant represented that he was the owner of the business.

[6] The matter has been argued and briefed with great care and at great length, and at times with acrimony. But when all is said and done, the defendant never has had his day in court. He claims to have a meritorious defense, and the ends of justice will be better served if he is afforded an opportunity to present it.

The order is reversed. Each party to pay their respective costs on appeal.

WHITE, P. J. and DORAN, J., concur.

GILLESPIE et. al. v. CITY OF LOS ANGELES et al.

Civ. No. 16999.

District Court of Appeal, Second District, Division 2, California.

Dec. 28, 1949.

Rehearing Denied Jan. 13, 1950.

Hearing Granted Feb. 23, 1950.*

Actions by Ottie Gillespie, and others, against the City of Los Angeles, a municipal corporation, and the State of California, for negligence of defendants in failing to properly maintain a portion of a state highway resulting in the death of six persons whose automobile left the pavement at a curve.

The Superior court in Sacramento held that the amended complaint did not state a cause of action against the state of California. The Superior Court, Los Angeles

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* Subsequent opinion 225 P.2d 522.

County, Clarence L. Kincaid, J., on transfer of the cause entered judgment aggregating $110,000 against the city, and the city appealed.

The District Court of Appeal, Moore, P. J., held that the city was liable under the general law to maintain the highway in such condition as would prevent injuries to persons resulting from dangerous or defective conditions of the public streets or highways, and that the city was liable under its contract with the state whereby city agreed to maintain that portion of the highway on which the accident occurred and affirmed the judgment.

1. Municipal corporations 🔑767

Under Public Liability Act, city's liability generally exists not only for defects arising after construction of street and highways but also for improper construction in the first instance. Gen.Laws, Act 5619, §§ 1 et seq., 2.

2. Municipal corporations 🔑798, 821(14)

In order for city to escape liability under Public Liability Law city must either eliminate dangerous conditions or protect public by adequate warnings on highways and streets and sufficiency of such warnings is a question of fact in each instance. Gen.Laws, Act 5619, §§ 1 et seq., 2.

3. Highways 🔑198
Municipal corporations 🔑759(1)

Under Public Liability Act imposing liability on municipalities for injuries to persons or property resulting from dangerous or defective conditions of public streets and highways where city has notice of defect and fails to remedy it, it is not required that a municipality exercise control over a highway but liability is imposed where municipality has authority to remedy such condition and fails to do so. Gen.Laws, Act 5619, §§ 1 et seq., 2.

4. Highways 🔑105(2)
Municipal corporations 🔑759(1)

Where city and state entered into agreement pertaining to maintenance of certain state highways within city providing that duty was delegated to city to maintain areas between curved lines and right of way lines, city was, in such area, obligated to do whatever was essential to make highways safe for travel at all times and having admitted execution and validity of its own contract the city could not deny the significance of its plain provisions. Streets and Highways Code, §§ 100, 130, 188, 202, 203; Revenue and Taxation Code, §§ 7351, 8357, 8651, 9302.

5. Highways 🔑198
Municipal corporations 🔑759(1)

Where city contracted with state to maintain areas between curved lines and rights of way lines on highways located within city, city was required either to paint zig-zag white stripes on pavement at approaches to curves or keep barriers outside the pavement wherever a dangerous condition existed so near the pavement as to be a peril, or to post warning signs, and having failed to do those things, even though it lacked power and authorization to do so, city was not relieved of responsibility to warn person lawfully using highway that a dangerous condition existed. Streets and Highways Code, §§ 100, 130, 188, 202, 203, 676. Gen.Laws, Act 5619, §§ 1 et seq., 2.

6. Highways 🔑198
Municipal corporations 🔑757(1)

A municipality may not ignore a hazard to travelers within its borders on the ground that it lacks jurisdiction to act.

7. Automobiles 🔑254
Highways 🔑198

In action against city for respective deaths of six persons killed when automobile in which they were riding went off a curve on highway located within city limits and plunged into a canyon, where city, although empowered under a contract with state to care for and maintain areas between curved lines and right of way lines, failed to act and had failed to urge action on part of Department of State which city contended had sole power to act, city could not assert that it was not delinquent in its duty to the public. Streets and Highways Code, §§ 100, 130, 188, 202, 203, 676.

8. Appeal and error 🔑1170(7)
Automobiles 🔑305(1)
Highways 🔑210(1)

In action against city for respective deaths of six persons killed when automobile in which they were riding went off a curve on highway located within city limits and plunged into canyon, admission of evidence to show efforts of city to induce state to construct projects on other portions of highway out of available highway funds and to show that such a procedure was available to city to procure the improvement of the portion of the highway on which accident occurred was proper to enable jury to determine whether city had been delinquent in its duty to the public and if inadmissible was not prejudicial. Streets and Highways Code, § 27; Const. art. 6, § 4½.

9. Death ⚷99(5)

Award of $20,000 for death of woman's youngest son, her sole support, was not excessive.

10. Death ⚷99(4)

Award of $30,000 to widow whose expectancy exceeded 40 years and son's minority exceeded 18 years, for loss of husband and father whose income was in excess of $3,000 per annum was not excessive.

11. Death ⚷99(3)

Award of $15,000 to parent for deaths of each of their minor children was not excessive.

12. Appeal and error ⚷999(1)

Findings of jury as to decedent's loyalty and affection and contributions to his parents are conclusive in the absence of error.

13. Appeal and error ⚷1004(1)

A large award for the loss of a loved one does not in and of itself establish that it is the result of prejudice or passion.

14. Damages ⚷127

Compensation for loss must be fixed in view of purchasing power of the dollar at the time of the loss and not by its power 20 years ago.

15. Damages ⚷127

Value of an award of damages is not to be estimated in the numerical quantum of recompense but in its comparative ability to furnish the necessities of life, and loss of comfort, society and protection must also be considered in fixing the damages.

16. Venue ⚷82

Where plaintiff commenced action in Superior Court of Los Angeles County but action was removed to Sacramento County on motion of defendant state, so that state's contention that the complaint failed to state a cause of action could be submitted to the court, and after judgment of dismissal as to state, case was transferred by court to Los Angeles County on the ground of convenience of witnesses, transfer was proper as Sacramento court did not consider merits of respondent's cause of action against other defendant but simply determined as matter of law that the facts alleged in the complaint were insufficient to constitute a cause of action against the state. Code Civ.Proc. § 397.

* * *

Ray L. Chesebro, City Attorney; Leonard G. Husar, Deputy City Attorney; Bourke Jones, Assistant City Attorney; Victor P. Spero, Deputy City Attorney, Los Angeles, for appellant.

Ben C. Cohen, Leo Shapiro, S. S. Hahn, Los Angeles, for respondents.

MOORE, Presiding Justice.

Appeals from six judgments on verdicts against appellant for its negligence in failing to maintain a portion of a state highway resulting in the deaths of six persons, and from the order denying appellant's motion to set aside such judgments.

In the far reaches of the sprawling city of Los Angeles through the mountainous region that lies to the west of that metropolis, a state highway—route 156—lies along a circuitous canyon road. While it extends in a generally westward direction through Topanga Canyon from Ventura Boulevard[1] to the Pacific ocean about 20 miles, only .86 of a mile thereof lies within the city's corporate limits. Along this highway an automobile with six occupants proceeded on the night of September 4, 1943. At a curve in the road the vehicle did not follow the pavement, but, instead, continued on a straight course and plunged 150 feet into the canyon below. No one that viewed the tragedy survived to relate who was driving, the rate of speed of travel or the direction in which the car was headed. The only memento of the dire event was the burned wreckage in the sullen depths below. From the evidences of the manner in which the machine left the pavement and tumbled into the gorge and from the applicable presumptions, it was established that by reason of the city's negligence in failing to maintain warning devices and barriers along the right of way of route 156 the decedent motorists rushed to their deaths.

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[1] A Principal state highway running to the north and south.

The road was surfaced with asphaltic concrete pavement varying in width from 20 to 24 feet with shoulders of rock and oil or decomposed granite from six to eight feet in width. At the scene of the accident there were no barriers, posts, barricades, blinkers, cats eyes or other warning devices. Neither was there a zig-zag line painted on the pavement at the approach to the curve. A center stripe of broken white lines had been painted on the road approximately three months earlier. The average life of such a stripe is 14 or 15 months. The grade was approximately 5.5 per cent and the curve had a radius of approximately 150 feet with similar curves above and below the point of accident. Standard signs such as "Winding Road" and "Slow" to a designated safe speed had been installed at points above and below the locus of the accident. There was some evidence that the road was within a dimout area proclaimed by the Western Defense Command.

Actions by surviving relatives against appellant, sometimes herein referred to as the city, and the State of California were commenced on the theory that the highway had been defectively designed and that the city and the state had permitted a dangerous and defective condition to exist which caused the accident. After the court at Sacramento held that the amended complaint did not state a cause of action against the state, the action was dismissed as to that defendant. Thereupon, the cause was transferred to the court below in which, after trial, verdicts aggregating $10,000.00 were entered against the city.

As grounds for reversal the city contends:

(1) The boulevard involved is a state highway and under the exclusive control of the state and therefore the city cannot be liable for neglect of it.

(2) Since the danger complained of relates to the construction and design of the highway, the agreement to maintain cannot be held to apply to the Topanga Canyon road.

(3) Not only was the highway not in a dangerous or defective condition but it does not appear that the condition of the highway was a proximate cause of the accident.

(4) The trial having been commenced in Sacramento county, its transfer to Los Angeles county for the purpose of resuming and finishing the proceeding was prejudicial error; the superior court of Los Angeles county had no jurisdiction to try the cases and enter judgments.

City Liable Under General Law

The instant action was instituted under the "Public Liability Act" of 1923, Statutes, 1923, p. 675; Deering's Gen.Laws, Act No. 5619. Section two provides "* * * municipalities * * * shall be liable for injuries * * * resulting from the dangerous or defective condition of public streets, highways * * * *in all cases* where the governing or managing board of such * * * municipality * * * *having authority to remedy such condition,* had knowledge or notice of the defective or dangerous condition * * * and failed or neglected * * * to remedy such condition or failed and neglected * * * to take such action as may be reasonably necessary to protect the public * * *." (Emphasis added.)

[1, 2] Under the act liability is imposed upon municipalities for injuries to persons or property resulting from dangerous or defective conditions of public streets and highways when the city has notice of the defect and fails to remedy it. Watson v. City of Alameda, 219 Cal. 331, 333, 26 P.2d 286; Arellano v. City of Burbank, 13 Cal. 2d 248, 254, 89 P.2d 113. The general rule is that liability exists not only for defects arising after construction but also for improper construction in the first instance. George v. City of Los Angeles, 11 Cal.2d 303, 308, 79 P.2d 723; Sandstoe v. Atchison T. & S. F. Ry. Co., 28 Cal.App.2d 215, 219, 82 P.2d 216. In order to escape liability the city must either eliminate the dangerous condition or protect the public by adequate warning, and the sufficiency of such warning is a question of fact in each case. Bigelow v. City of Ontario, 37 Cal. App.2d 198, 205, 99 P.2d 298; Barsoom v. City of Reedly, 38 Cal.App.2d 413, 419, 101 P.2d 743.

[3] The jury by its verdict has impliedly found that a dangerous and defective condition existed, and that appellant had notice thereof but failed to remedy it. Under the Act there remains only one other condition precedent to the imposition of liability on the city. The case must be one in which the municipality has "authority to remedy such condition". Appellant argues that it did not exercise control over the highway here involved, and therefore is not liable under the act. The act does not require that a municipality *exercise* control over a highway; rather, it imposes liability where the municipality has "authority to remedy such condition" and fails to do so. The language of the Act of 1923 is sufficient authority for the city under the facts to remove the peril. The authorities relied upon by appellant are not pertinent on this point. They, Watson v. City of Alameda, 219 Cal. 331, 26 P.2d 286; Perry v. City of San Diego, 80 Cal. App.2d 166, 181 P.2d 98; and Sinclair v. City of Pasadena, 21 Cal.App.2d 720, 70 P.2d 241, relate only to the question of the sufficiency of the notice to the cities involved that a dangerous and defective condition existed. In the instant case the sufficiency of the notice is attested by the prior accidents at the same place. Bigelow v. Ontario, supra, 37 Cal.App.2d at page 204, 99 P.2d at page 301; Sandstoe v. Atchison T. & S. F. Ry. Co., 28 Cal.App. 2d 215, 219, 82 P.2d 216. Galiano v. Pacific Gas & Electric Co., 20 Cal.App.2d 534, 67 P.2d 388, is not applicable. It concerns the liability of an abutting property owner, and not that of a municipality.

Appellant's contention that a municipality is not liable for dangerous and defective conditions over which it does not exercise control is not supported. If the failure to exercise control were sufficient to avoid liability the whole purport and intent of the Public Liability Act of 1923 could be obviated simply by inertia. The cases cited by appellant are not in point because the applicable statutes specifically relieved the municipalities of liability or because they were instituted against parties other than municipalities. Notwithstanding the Act of 1923 and the authorities last cited, appellant contends that it "has no supervision or control over route 156 within its city limits." In support of such contention it cites a number of authorities which on close inspection fail of their purpose. In Southern California Roads Co. v. McGuire, 2 Cal. 2d 115, 39 P.2d 412, a proceeding in mandamus, the city had by contract with the state undertaken the construction and improvement of a state highway within the corporate limits. After such contract had been executed the petitioner agreed by a writing to do the work. This document fulfilled the requirements of the city charter but did not comply with state law. The court held that such a contract must conform with state law. No question of tort liability was raised in the case. Neither the proposition there enunciated nor the facts recited can aid in the solution of the question at bar. Merely because the state retains supervisorial powers over city subcontracts, the city is not thereby relieved of obligations imposed upon it by general law. In the cited case the entire work was to be done by the city. In the instant case, all work was to be done by the state with the exception of that done from the curb line to the property line. In the McGuire case, supra, the city took the position that it was required to comply with state law. In the instant case, the city takes the position that the general laws of the state did not impose upon it any obligation to erect barriers or warning devices in the area allocated to it by the contract. These contentions are not only inconsistent but the argument of the city finds no support in the McGuire case. In Stadelmann v. City of New York, 162 App.Div. 352, 110 N.Y.S. 682, the court held the city not liable for injuries sustained by a pedestrian. There is no showing that the road there involved was a state highway. The case sheds no light upon the instant issues. The same is true of Trotter v. Town of Glenmora, La. App., 2 So.2d 510, which follows the Stadelmann decision.

The City is Liable Under the Contract.

[4] For the purpose of improving and maintaining certain state highways, the state determined about August, 1943, to effect certain projects. In that month the city and the state entered into a written agreement pertaining to the maintenance of certain state highways within the city, including route 156. In compliance with section 203 of the Streets and Highways Code, the agreement provided for the expenditure of $7,250 by the Department of Public Works.[2] "The portions of state highway routes to be maintained under project 97(b) are described as follows: 'Route 156, Topanga Canyon Road, from city limits about 2.70 miles north of junction with Route 60 to north city limits near Fernwood Park; a length of approximately 0.86 mile for this portion.'" The Department of Public Works did not delegate authority or jurisdiction over route 156 in its entirety to the city. The only specific reference to that highway comes under the heading: "(b) Work by the department."

"Article VI, Miscellaneous Provisions" of the agreement provides: "In the event the work of maintaining the state highway routes within the city is being done by the department, the approval of the department shall be secured before any encroachment on the surface or any cut, excavations or openings in the vehicular roadway are permitted. *The department will maintain the State highways from curb line to curb line only. There is hereby delegated to the city the maintenance of the areas between curb lines and right of way lines* * * *."

Appellant advances the proposition that it is not liable for a dangerous condition of property over which it does not exercise control. If by any chance the city is not liable under the Public Liability Act and the decisions heretofore cited, it is liable beyond a peradventure by virtue of its agreement for detriment caused by its neglect to maintain its streets in a reasonably safe condition. Under its contract with the state the liability of appellant is accentuated. In support of its thesis, the city cites Griffith v. Town of Berlin, 130 Conn. 84, 32 A.2d 56; Gardner v. City of Covington, 86 Ind.App. 229, 156 N.E. 830; Brunacci v. Plains Township, 315 Pa. 391, 173 A. 329; Barnett v. City of Opelousas, La. App., 13 So.2d 788; Glover v. Town of Ponchatoula, La.App., 17 So.2d 44; Gabbert v. City of Brownwood, Tex.Civ.App., 176 S.W.2d 344. In no respect do these authorities apply. In none of them was there an agreement between the city and the Department of Public Works obligating the municipality to maintain a part of the highway in question.

While "full control and possession of all state highways is vested in the State Department of Public Works", Streets and Highways Code, sec. 100, yet the Department of State Highways may delegate to any city the department's powers, duties and authority as to any state highway or any part thereof. Ibid, sec. 676; Southern California Roads Co. v. McGuire, 2 Cal.2d 115, 123, 39 P.2d 412.

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[2] The fund expended on the construction and maintenance of highways is designated "Motor Vehicle Fuel Fund." It is raised by the levies of 6 cents per gallon on all gasoline fuel distributed in the state. Revenue & Taxation Code, secs. 7351 and 8651. The state treasurer pays it into the State Highway Fund. Ibid, secs. 8357, 9302. Such fund must be expended for the maintenance of state highways. Streets and Highways Code, sec. 188. The Department of Public Works shall expend an amount not less than the revenue derived from ¼ cent per gallon tax on such fuel for the improvement and maintenance of state highways within cities. Ibid, sec. 203. A municipality may contract with the state for the performance of the work within its corporate limits. Ibid., sec. 202, and in respect to the proportion of the expenses of such improvement and maintenance of a highway to be borne by the respective parties, and such highway may be located in whole or in part within the limits of the contracting city. Ibid., sec. 130.

Appellant contends that the italicized portions of its contract pertain to the maintenance of sidewalks and parking strips along those streets which are improved and that they can have no reference to a mountain road such as that in Topanga Canyon "where the only portion of the right of way improved for travel and so used is the roadway designed and maintained by the State for vehicular travel." But the unambiguous language of the contract clearly gives to the city the right and obligation to maintain those portions of the highway extending outward from the curb line to the right of way lines and by its contract the city was in that area obligated to do whatever was essential to make the highway reasonably safe for travel at all times. That the trial court adopted such thesis is evidenced by the fact that it instructed the jury that the pleadings admitted that by the agreement the city was authorized to maintain the areas between curb lines and right of way lines. This instruction was correct since appellant had attached a copy of the agreement to its answer as a part thereof. Having admitted the execution and validity of its own contract appellant is in no position to deny the significance of its plain provisions.

[5-7] Thus by contract not only did the city acquire the right to erect warning signs and barriers upon those portions of the highway outside the paved road but thereby its duties under the Public Liability Act were enlarged. There is no reasonable basis for appellant's contention that it lacked power to do the acts essential to the maintenance of the .86 mile on route 156 as a safe highway. The fund under control of the Highway Commission was available in sufficient amount to make it safe. By the contract the city was required to "maintain the highway from curb line to the right of way line." And even though the language of the contract did not require the city to perform any work upon the paved portion, a reasonable construction would require appellant either to paint zig-zag white stripes on the pavement at approaches to curves or to keep barriers outside the pavement wherever a dangerous condition existed so near the pavement as to be a peril, or to post warning signs. Having failed to do those things, even assuming appellant's contention that it lacked power or authorization to do so, it was nevertheless not relieved of the responsibility to warn persons lawfully using the highway that a dangerous condition existed. Shea v. City of San Bernardino, 7 Cal.2d 688, 693, 62 P.2d 365; Rose v. County of Orange, 94 Cal.App.2d 688, 211 P.2d 45. A municipality may not ignore a hazard to travelers within its boarders on the ground that it lacks jurisdiction to act. Shea v. City of San Bernardino, supra, 7 Cal.2d at pages 692, 693, 62 P.2d at pages 366, 367. There was no evidence adduced at the trial that the city had urged the Department to remedy the condition at the place of accident. Having failed to take action itself under a contract which empowered it to act, and having failed to urge action on the part of the Department which appellant contends had the sole power to act, the city cannot now assert that it was not delinquent in its duty to the public.

Maintenance

It is next argued that the posting of adequate warning signs and erection of guards and barriers is not a matter of maintenance, but of construction and therefore the agreement did not require the city to erect such devices. The answer to this contention is found in section 27 of the Streets and Highways Code: "* * * 'maintenance' includes * * * the necessary provision for special safety conveniences and devices."

Other Issues

[8] Over objection evidence was admitted to show efforts on the part of the city to induce the state to construct projects on other portions of route 156 out of the available fund. Appellant contends that its admission was prejudicially er-

roneous. The record discloses that the evidence was admitted to show that such a procedure was available to the city to procure the improvement of the portion of route 156 here involved. That the city was interested in the condition of other parts of the highway and failed to take an interest in that portion within its own boundaries was proper evidence to enable the jury to determine whether the city had been delinquent in its duty to the public. Since "the improvement of streets within the boundaries of a city is an affair in which the city is vitally interested", Shea v. City of San Bernardino, supra, 7 Cal.2d at page 693, 62 P.2d at page 367, its failure to take an interest therein is best demonstrated by its interest elsewhere. No valid reason appears why the city could not have requested authority from the Department to act and have requested its share of the gasoline tax fund with which to erect such guard rails and warning devices as would have removed the death trap which took the lives of the decedents. Even if the evidence was inadmissible, it is not shown how it proved prejudicial to appellant's cause, and without prejudice, the error, if any, is not ground for reversal. Constitution, Art. VI, sec. 4½.

Damages Not Excessive

[9-12] The damages awarded were not excessive. Ottie Gillespie was awarded $20,000 for the death of her youngest son, her sole support. Ila and Patrick Gillespie, the widow and minor son of Doyle Gillespie, were awarded $30,000 for the loss of the husband and father. The value of the proof of domestic infelicity in their home was a matter for the jury's appraisal as well as all other factual issues. The husband earned in excess of $3,000 per annum while the expectency of Ila exceeded 43 years and the minority of Patrick exceeded 18 years. The joint award to them was not excessive. See Sherman v. Southern Pacific Company, 34 Cal.App.2d 490, 93 P.2d 812; Weiand v. Southern Pacific Company, 34 Cal.App.2d 500, 93 P.2d 1023; McDonnell v. Southern Pacific Company, 17 Cal.App.2d 432, 62 P.2d 201. Petra Perez Oveso, Evelyn Russell, Charles Bittner and Mrs. and Mrs. Smith were awarded $15,000 respectively for the deaths of their minor children. In the case of each of these plaintiffs, ample proof was adduced showing the contributions by the decedent to his parents and his loyalty to and affection for them. On these matters the findings of the jury in the absence of error are conclusive. Hunton v. California Portland Cement Co., 64 Cal.App.2d 876, 149 P.2d 471, 150 P.2d 221, cited by appellant on the excessiveness of the verdicts is not in point. The father was a young and successful businessman. The possibility that the deceased son would ever have supported him was too remote.

[13-15] A large award for the loss of a loved one does not in and of itself establish that it is the result of prejudice or passion. Compensation for loss must be fixed in view of the purchasing power of the dollar at the time of the loss and not by its power of 20 years ago. Today the dollar's value in purchasing power is not to exceed 60 per cent of its value in 1940. The value of an award is not to be "estimated in the numerical quantum of the recompense but in its comparative ability to furnish the necessities of life." O'Meara v. Haiden, 204 Cal. 354, 367, 268 P. 334, 339, 60 A.L.R. 381; Butler v. Allen, 73 Cal.App.2d 866, 867, 870, 167 P.2d 488; Brown v. Boehm, 78 Cal.App.2d 595, 603, 178 P.2d 49. Not only is loss in dollars and cents to be considered in fixing damages, but also loss of comfort, society and protection. Therefore, no yardstick as to amount can be utilized. Holder v. Key System, 88 Cal. App.2d 925, 940, 200 P.2d 98. In the instant case it cannot be said that the compensation awarded for the loss of minor child or husband was unduly generous.

The Court had Jurisdiction.

[16] Appellant's final contention is that the superior court of Los Angeles county was without jurisdiction to try the cause. The action was originally filed in that county but was removed to Sacramento county on motion of the State where it was stipulated between plaintiffs and the State: "* * * that since said defendant desires to present to the above-entitled court

the defendant's contention that the complaint fails to state a cause of action, and since both parties desire to determine said point without inconveniencing a large number of witnesses by preparing at this time for the trial of the entire cause, it may be deemed that the first witness has been sworn and that the said defendant has seasonably objected to the introduction of any testimony whatever on the grounds that the complaint fails to state a cause of action against the defendant State of California, and that thereupon the matter may be argued and submitted to the court." The objection of the State was sustained and a judgment of dismissal as to the State rendered. The cause was then transferred by the court to Los Angeles county on the ground of convenience of witnesses under subdivision 3 of section 397 of the Code of Civil Procedure. Appellant asserts that the trial had actually commenced in Sacramento county and that it was therefore improperly discontinued and transferred to another county.

It is the prevalent practice to rule upon a general demurrer before receiving evidence of the allegations. Upon the State's objection to any evidence the issue of law was raised as to the sufficiency of the complaint. The Sacramento court did not consider the merits of respondents' cause of action against appellant but simply determined as a matter of law that the facts alleged in the second amended complaint were insufficient to constitute a cause of action against the State. That ruling having adjudicated with finality respondents' claims against the state, it was correct practice to deal with the matter as though respondents had filed the action at first in the Sacramento court against the city only. No pertinent authority is cited for the proposition that the court could not thereafter transfer the cause to another county for the convenience of witnesses. What else could the Sacramento court have done since the only interested parties remaining in the action were residents of Los Angeles county and their witnesses resided there? To have denied the demand for removal would have been an injustice to all the litigants.

All the issues presented by this appeal were duly considered by the trial judge during the course of the trial. The question of jurisdiction was considered on the hearing of appellant's motion to set aside the judgments. No prejudicial error appears with respect to any judgment or in the order denying appellant's motion to set aside the judgments.

The judgments and the orders are affirmed.

McCOMB, J., concurs.

WILSON, J., concurs in the judgment.

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HORNADAY v. HORNADAY et al.
(two cases).

CALIFORNIA TRUST CO. v. HORNADAY.

LEACH v. HORNADAY.

Civ. 17209, 17208, 17274, 17273.

District Court of Appeal, Second District,
Division 2, California.

Dec. 28, 1949.

Rehearing Denied Jan. 20, 1950.

Hearing Denied Feb. 23, 1950.

Patricia Lee Hornaday and the California trust Company, as guardian for William Ronald Leach, a minor, filed petitions in their own guardianship proceedings for an order surcharging Mary B. Hornaday, administratrix of the estate of F. Paul Hornaday, deceased, for the sums paid as expenses in proceeding to have deceased removed as guardian of the estates. The petitions were consolidated with actions by Patricia Lee Hornaday and by William Ronald Leach, a minor, by California Trust Company, guardian of his estate, against the administratrix and the National Automobile Insurance Company and National Surety Corporation, as sureties on the guardianship bond, for damages.

Orders were entered by Superior Court, Los Angeles County, Kurtz Kauffman, and John J. Ford, JJ., sustaining demurrer to the petitions in the guardianship proceedings, and judgments were entered dismissing the actions, and the plaintiffs appealed.

The District Court of Appeal, Moore, P. J., held that attorney's fees paid for services in effecting removal of guardian could not be recovered either from personal representative of guardian after guardian's death or surety on guardian's bond.

Appeals from orders sustaining demurrers to petitions in guardianship proceedings dismissed, and judgments of dismissal of the actions affirmed.

1. Guardian and ward ⚷161

Orders sustaining demurrers to petitions in guardianship proceedings for order surcharging administratrix of estate of guardian, now deceased, for sums paid as expenses in causing guardian's removal were not appealable. Probate Code, § 1630.

2. Guardian and ward ⚷163

Where guardian had not taken any money or property from ward and his final account was approved by probate court, guardian's status with respect to guardianship was settled and order settling guardian's final account became res judicata.

3. Guardian and ward ⚷179

In absence of decree establishing fact of breach of duty by guardian for amount due by him to estate of ward, surety on guardian's bond cannot be held for loss.

4. Guardian and ward ⚷73, 182(5)

In absence of allegations of guardian's breach of duty and of amount found to be due to estate of ward by reason thereof, no cause of action was stated against either administratrix of the estate of guardian, now deceased, or surety on his bond to recover attorney's fees paid for services in effecting guardian's removal from office.

5. Guardian and ward ⚷73

A claim against administratrix of estate of guardian, now deceased, for attorney's fees paid in proceedings for guardian's removal because of guardian's plan to sell estate of ward to gain a personal advantage to himself was a claim based upon "contract" and not "tort", and was barred by virtue of failure to file claim in guardian's estate as required by statute. Probate Code, §§ 707, 708, 732.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Contract" and "Tort".

6. Assault and battery ⚷2

A mere gesture, however vicious, is not an actionable "tort" and is not a basis for recovery.

7. Conspiracy ⚷6

A civil wrong resulting in damage, and not the naked conspiracy itself, constitutes the actionable "tort".

8. Guardian and ward ⚷2

The estate of a minor is in custody of probate court, and guardian when he pursues administration of estate according to law is an agent of the court, not its master.

9. Guardian and ward ⚷73, 179

Where probate court did not surcharge guardian's account with a definite sum for attorney's fees paid in proceedings for guardian's removal, after hearing to which guardian was a party, such sum could not be collected from guardian's estate after death of guardian, nor from surety on his bond.

10. Costs ⚷172

Attorney's fees paid by a successful plaintiff in an action are not recoverable against defendant, except where defendant had promised to pay such fees in event of plaintiff's recovery or there is a statute authorizing such charges as an element of damage suffered.

11. Attorney and client ⚷155

The practice of awarding costs and attorney's fees for services rendered by a plaintiff who in equity protects, preserves or increases a fund in which many are interested does not alter general rule that attorney's fees paid by successful plaintiff in an action are not recoverable against defendant.

12. Trover and conversion ⚷60

Although under statute the plaintiff in action for conversion may recover compensation for time and money properly expended in pursuit of property, attorneys' fees will not be allowed under guise of punitive damages. Civ.Code, § 3336.

13. Guardian and ward ⚿173

Surety upon bond of guardian of estate of minor was responsible only for faithful performance of such duties as were imposed by law upon guardian, and there was no obligation upon surety to defend against removal proceedings brought against guardian.

14. Guardian and ward ⚿176

The duty of guardian of estate of a minor which was guaranteed by surety on guardian's bond was to account for moneys or other movables that came to guardian's hands, and that act was complete when guardian's successor receipted for total inventory.

15. Guardian and ward ⚿58

The guardian of estate of a minor could not charge to estate his expense of defense of proceedings seeking his removal.

16. Guardian and ward ⚿175

In absence of allegation that injury guardian did to estate of his ward was committed while attempting to do official act, surety on guardian's bond was not liable on the bond.

On Petition for Rehearing.

17. Guardian and ward ⚿159

Orders sustaining demurrers to petitions in guardianship proceedings for order surcharging administratrix of estate of guardian, now deceased, for sums paid as expenses in causing guardian's removal were determinations that no facts had been alleged which would empower court to make any order under statute. Probate Code, § 1555.

18. Guardian and ward ⚿161

Where merits of asserted right of appeal from orders sustaining demurrers to petitions in guardianship proceedings were fully covered by appellate court's treatment of the appeals from the judgments of dismissal, no prejudice was caused by such dismissals.

Jennings & Belcher, Los Angeles, Stevens Fargo, Louis E. Kearny, Los Angeles, of counsel, for appellant.

Bailie, Turner & Lake, Los Angeles, and H. A. Gebhardt, Los Angeles, for respondent.

Jennings & Belcher, Los Angeles, Stevens Fargo, Los Angeles, for appellant.

H. A. Gebhardt and Bailie, Turner & Lake, Los Angeles, Norman A. Bailie, Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for decision is whether attorney's fees paid by the guardian of a minor's estate for services in effecting the removal of his predecessor in office may be recovered from the personal representative of such predecessor.

In September, 1942, F. Paul Hornaday was duly appointed guardian of the estates and persons of Patricia and Ronald Leach, minors. On November 11, 1944, he was removed as guardian of each estate by order of the court and was ordered to turn over to Mae McCallom as special guardian all the assets and records of each estate. Subsequently, the orders removing Mr. Hornaday were affirmed. McCallom v. Hornaday, 30 Cal.2d 297, 182 P.2d 529.

The events that precipitated the removal proceedings were his action in filing petitions for instructions for the sale of the assets of the estates. The petitions set forth his plan of procedure. Displeased with such plan and the evident desire of the guardian to acquire interests adverse to the faithful performance of his official duties, Mrs. McCallom caused herself to be appointed guardian ad litem of the minors, objected to Hornaday's petition and demanded his removal. The court issued an order for him to show cause why he should not be removed. He duly answered both the petition and the order. Following a hearing, the court made orders (1) denying his petition for instructions; (2) directing his removal and (3) appointing Mrs. McCallom as special guardian with powers of a general guardian in both proceedings. For a time she administered the two estates, then filed her final accounts whereby she requested allowances for her own services and for sums paid by her as fees, costs and expenses in causing Hornaday's removal. Omitting a recital of the numerous petitions, objections and hearings it all eventuated in the court's allowing her $34,008.51 out of Patricia's estate and $28,876 out of Ronald's estate for sums paid out for costs, and attorney's fees while she was acting under the court's appointment as guardian of the estates. Having been removed by order of court Hornaday filed his final account showing that he had turned over to his successor in office the assets of both estates. No costs were ever charged by him as guardian. The only charges made against him in either estate were assessed against him personally. Mrs. McCallom having deceased, her administrator filed her final account and petition in Ronald's estate for fees, costs and expenses incurred by the deceased guardian and it was settled and allowed. Patricia having been emancipated filed her own objections to the final accounts and after the court had settled them she thereafter pursued the same course as that of Ronald's guardian in an effort to retrieve the moneys paid out by Mrs. McCallom in her campaign to cause the removal of her predecessor. Each filed a petition in his own guardianship proceeding for an order surcharging the administratrix of the estate of Hornaday for the sums paid as expenses in causing the latter's removal. Patricia's amended petition in her guardianship proceedings alleged substantially the facts above related with reference to Hornaday's petition to sell the assets of her estate, the appointment of the guardian ad litem, the petition for Hornaday's removal, the findings that he had attempted to acquire interests adverse to his guardianship duties, that he was guilty of waste and mismanagement and had failed to file inventories and accounts as required by law; that such conduct resulted in "the necessary expenditure of funds from the estate of this minor and loss to said estate of certain costs and expenses" amounting to $53,403.38, the value of services of Mrs. McCallom and of her attorneys. The petition of Ronald's guardian was the same in form as that of Patricia. The amount he sought to have surcharged to Hornaday's estate was $39,376.

[1] Mrs. Hornaday's demurrers to both petitions were sustained without leave to amend, her motion to quash the citations issued on the petitions were granted and the citations were dismissed. From such orders both petitioners gave notice of appeal but since no provision is made for appeal from such an order by section 1630 of the Probate Code which is exclusive in guardianship proceedings, In re Guardianship of Lyle, 77 Cal.App.2d 159, 161, 174 P.2d 910, those purported appeals will be dismissed.

Coeval with the filing of the petitions in the guardianship proceedings, the two wards instituted actions against the administratrix of Hornaday's estate and against National Surety Corporation, the surety on the guardianship bonds, for damages. After stating the facts above narrated the amended complaints allege that by the findings and order of the probate court it was adjudicated that Hornaday neglected faithfully to execute his duties as guardian and "conducted himself in a manner adverse to the faithful performance of his duties as such guardian;" that such neglect resulted directly and proximately in loss to the estates of said minors; that the attorneys employed by Mae McCallom rendered services to the minors and their estates in respect to the proceedings for the removal of Hornaday as guardian; that after his removal the court conducted hearings and found the value of the services of Mrs. McCallom and her attorneys and the costs, all of which were necessary to the preservation of the estates, and directed payment of such expenses which were paid and reported in the accounts of the duly acting guardians and those accounts were settled and allowed; that the National Surety Corporation as surety for Hornaday as guardian filed its bond with the clerk of the court on April 27, 1944, in the penal sum of $132,000 with the court's approval. Appellant alleged damages against the Hornaday estate and the National Surety Corporation in the amount paid as costs and attorney's fees in the removal proceedings.

After hearing of the demurrers of both defendants, the court sustained them and adjudged dismissals of both actions. For the purpose of this appeal the two orders in the guardianship proceedings and the two judgments were consolidated. Since the two complaints are in substance identical in theory and in fact this discussion will relate to Patricia's complaint and the conclusions derived will apply to Ronald's as well. This appeal is to test the correctness of the ruling on the demurrer.

Hornaday's Account was Approved

[2] The worst that was charged against the deposed guardian was that he planned to sell the estate of his ward to gain a personal advantage to himself. He took no goods, chattel or money of his ward. He merely laid a scheme whereby he planned to induce the court to authorize a sale for his advantage. Had it not been frustrated by vigilant eyes and diligent action it might have resulted in tragical loss to the estate. But between the moment of a criminal concept and the hour of its consummation there is always a *locus poenitentiae.* If the feeling of repentence intervenes the contemplated wrongful act dies abornin' and no detriment is suffered.

Hornaday not having taken a farthing from his ward and his final account having been approved by the court, his status with respect to the guardianship was settled and by the established rule the order became *res judicata.* Adams v. Martin, 3 Cal.2d 246, 248, 44 P.2d 572. As in the cited case, this is not an action in equity to set aside the order settling Hornaday's account on the ground of extrinsic fraud, nor does appellant contend that her property was concealed or that Hornaday failed to account for it. Neither did she allege a fraudulent prevention of a hearing.

No Decree Declaring a Breach or Amount Due by Hornaday.

[3, 4] The only things determined by the findings and judgment on the charges brought by Mrs. McCallon were Hornaday's perfidy and his removal from office and that Mrs. McCallon recover her costs from Hornaday, the removed guardian, or from the estate of the ward. The amended complaint alleges that by the findings, conclusions and order of Judge Vickers it was adjudicated that Hornaday had neglected to execute faithfully the duties of his trust as such guardian and had conducted himself in a manner adverse to the faithful performance of his official duties. If the findings and conclusions do not have the force and effect of an adjudication, In re Guardianship of Leach, 30 Cal.2d 297, 310, 182 P.2d 529, and if the order of the court merely removed Hornaday as guardian there is no decree establishing the fact of the breach or the amount due by him. Without such decree the surety on the guardian's bond cannot be held for the loss. Richardson v. Royal Indemnity Company, 21 Cal.2d 557, 560, 134 P.2d 1. It is true that the amended complaint sets forth as a recital that after Hornaday filed his petition for leave to sell "the stock" Mrs. McCallom employed attorneys "on behalf of the estate * * * to assist her in the prosecution of the rights of said minor and her estate * * * that subsequent to hearings conducted in this court, orders * * * were made * * * finding the value of said services" of Mrs. McCallom as guardian "and of the services of said attorneys, and the costs of said proceedings." However, no proceeding was ever instituted to establish the cost of the removal of Hornaday. In re Guardianship of Leach, supra. No amount is alleged to have been fixed as such cost. The complaint merely declares that such services and costs were necessary to the preservation of the minor's estate, then alleges an order was made directing payment of the amount from the minor's estate, and that such amount was paid "on account of said expenses." The "expenses" so paid were incurred during a three-year period but there is no allegation that they were incurred "during the pendency" of the removal proceedings; nor is it alleged that such services were applied solely to the effort of removing the disloyal guardian. In fact, he was removed eight months and 14 days after Mrs. McCallom was appointed as guardian ad litem. In the absence of allegations of Hornaday's breach and of

the amount found to be due by reason thereof no cause of action is stated.

No Claim was Filed

[5] Appellant's cause of action is barred by virtue of her failure to file her claim in the estate of Hornaday as required by section 732 of the Probate Code. That statute is mandatory: "A judgment against the decedent for the recovery of money must be filed or presented in the same manner as other claims." Appellant contends that her claim is based upon a tort, not upon contract. Probate Code, sec. 707.[1] If she relies upon Hornaday's bond or upon his oath of office, surely her claim is based upon contract. There is no statute or decision cited or known which excuses the timely filing of a claim against a decedent's estate or extends the time by reason of the fact that the claimant was a minor, had no guardian during a portion of the time during which he could have filed a claim, or because he had no guardian at all. No person can avail himself of a disability unless it existed when his right of action accrued, Code Civ.Proc., sec. 357, and no claim which is barred shall be allowed by the administrator or by the judge. Probate Code, sec. 708.[2] The only judgment entered by the Probate Court against Hornaday was for costs in appellant's guardianship proceeding in the sum of $226.85. Since that sum was paid by her guardianship estate her right to claim payment now against Hornaday must necessarily be based upon that judgment and her subrogation thereto. The pleading shows no such claim was filed. [The same is true in Ronald's estate.]

Moreover, at the time and in the proceeding wherein the allowance of attorney's fees was made, Hornaday was not a party. He had already been removed from office for two months. Is it reasonable that he should be charged with sums paid by Mrs. McCallom without his approval and fixed by the court without his even being notified of the hearing or called to testify to the value of the services rendered? To suggest that his estate should now be required to pay the judgments rendered ex-parte against him is to ignore the doctrine of due process. Certainly his own administratrix would be entitled to the privilege of contesting such claim after the orthodox fashion which could have been done only after a filing of the claim. But had such claim been filed, it would have been rejected because the judgment for Mrs. McCallom's services and those of her attorneys was not against Hornaday. If he had appropriated $100,000 out of appellant's estate and judgment therefor had been entered against him for the money, there would have been no chance to recover the amount of the judgment from his estate without presentment by the owner of the judgment of a claim based on such judgment. Since that is true, it is inconceivable that appellant could walk unceremoniously into court and demand judgment for a sum of money awarded against an estate in a proceeding in which the alleged debtor was not a participant.

Appellant's contention that her action is based upon a tort is refuted by the fact that she has sued upon the bond and seeks to collect from the surety. Of course, before she can obtain judgment against the surety there must have been established a breach of the bond and the amount of damages suffered by the estate. Since no judgment was ever entered against Hornaday in the estate proceedings and no claim was filed with his administratrix within time, Probate Code, sec. 700 and was therefore barred, recovery for breach of contract is hopeless.

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[1] 707. "All claims arising upon contract, whether they are due, not due, or contingent * * * must be filed or presented within the time limited in the notice * * *."

[2] 708. "No claim which is barred by the statute of limitations shall be allowed or approved by the executor or administrator, or by the judge. When a claim is presented to a judge for his allowance or approval, he may, in his discretion, examine the claimant and others on oath, and hear any legal evidence touching the validity of the claim. No claim which has been allowed is affected by the statute of limitations, pending the administration of the estate."

[6, 7] As to the claim's being based upon tort: what act of Hornaday is alleged as a tort? Paragraph III of the amended complaint is the nearest approach. It is there alleged that as guardian of the estate on March 28, 1944, Hornaday filed a petition to sell an asset of the minor's estate consisting of stock in the Leach Relay Corporation; the petition was noticed for hearing; objections were filed; Hornaday was removed. His motion to the court, asking the court to join him in selling the stock was no tort. Had the court granted the motion and had Hornaday sold the stock to his own dummy and thereby realized a profit, a tort would have occurred. But a mere gesture, however vicious, is not an actionable tort; is not a basis for recovery. See Wallace v. Kerr, 42 Cal.App.2d 182, 185, 108 P.2d 754, and authorities there cited holding that it is the civil wrong resulting in damage that constitutes the actionable tort, not the naked conspiracy itself.

[8,9] The estate of a minor is in the custody of the Probate court. In re Guardianship of Russell, 21 Cal.2d 767, 772, 135 P.2d 369. The guardian when he pursues the administration of an estate according to law is an agent of the court, not its master. In filing his petition, Hornaday was either asking the advice and approval of his plan to sell the stock or his mind was filled with dark pictures of his taking over the stock at a huge profit to himself. If the court had found that he was innocently recommending a sale of which the court disapproved, his petition would have been dismissed, the estate paying any cost incurred by the court's investigation. Had it found the second alternative, it would have dismissed the petition, the estate paying the cost. Removal of the guardian would rest in the court's discretion. If by filing a petition with evil intent no damage is proximately caused thereby, what sum would the beneficiary of the estate be entitled to collect from the guardian? Certainly, none. City of San Bruno v. National Surety Co., 119 Cal.App. 27, 31, 5 P.2d 951. And unless the Probate court surcharged the guardian's account with a definite sum allowed, after a hearing to which the guardian was a party it could not be collected from the guardian's estate, nor from the surety on his bond.

Attorney's Fees are not Chargeable to the Defendant.

[10] It is a settled rule of California that attorney's fees paid by a successful plaintiff in an action are never recoverable against the defendant. The only known exceptions to the rule are found in those cases (1) where the defendant has promised to pay such fees in event of plaintiff's recovery or (2) there is a statute authorizing such charges as an element of damage suffered. An agreement on a promissory note or in a lease to pay attorney's fees if payee should prevail in an action based on the writing are illustrative of the first class. Statutes authorizing charges such as expenses incurred in the dissolution of attachments or injunctions where a statutory remedy has been abused illustrate the second class. Soule v. United States Fidelity & Guaranty Co., 82 Cal.App. 572, 573, 255 P. 886; Elder v. Kutner, 97 Cal. 490, 493, 32 P. 563. Even in assessing damages suffered by a defendant whose property has been unjustly attached the court is zealous to avoid awarding more than is necessarily incurred to dissolve a writ of attachment, Elder v. Kutner, supra, 97 Cal. at page 494, 32 P. 563, or an injunction. San Diego Water Company v. Pacific Coast Steamship Co., 101 Cal. 216, 221, 35 P. 651; Bustamente v. Stewart, 55 Cal. 115, 116. But awarding attorney's fees for the *defense of the action* wherein an extraordinary writ has been issued is not authorized. Elder v. Kutner, supra.

[11, 12] The policy of the law of this state that an unsuccessful party to a legal controversy cannot be assessed damages to the extent of the value of the attorney's service employed by his adversary is established by a long line of decisions. Spooner v. Cady, 5 Cal.Unrep. 357, 44 P. 1018; Mitchell v. Hawley, 79 Cal. 301, 302, 21 P. 833; San Diego Water Co. v. Pacific Coast Steamship Co., supra, 101 Cal. at page 220, 35 P. 651; Miller v. Kehoe, 107 Cal. 340, 343, 40 P. 485; Curtiss v. Bachman, 110

Cal. 433, 437, 42 P. 910, 52 Am.St.Rep. 111; Black v. Hilliker, 130 Cal. 190, 193, 62 P. 481; Commercial Savings Bank v. Hornberger, 140 Cal. 16, 22, 73 P. 625; Los Angeles Trust & Savings Bank v. Ward, 197 Cal. 103, 107, 239 P. 847; Kahn v. Smith, 23 Cal.2d 12, 15, 142 P.2d 13; In re Estate of Reade, 31 Cal.2d 669, 671, 191 P.2d 745; 11A Cal.Jur., p. 247, sec. 161. These and other authorities disclose a uniform policy of the courts that the unsuccessful litigant shall not in the ordinary contest be required to pay counsel fees incurred by his opponent. The practice of awarding costs and attorney fees for services rendered by a plaintiff who in equity protects, preserves or increases a fund in which many are interested does not alter or depreciate the general rule. The California rule prevails generally in other jurisdictions. Dorris v. Miller, 105 Iowa 564, 75 N.W. 482; Huff v. Bidwell, 5 Cir., 195 F. 430, 432; Tullock v. Mulvane, 184 U.S. 497, 22 S.Ct. 372, 46 L.Ed. 657, 666; In re Estate of Bell, 145 Cal. 646, 651, 79 P. 358. While under section 3336 of the Civil Code in actions for conversion the plaintiff may recover compensation for the time and money properly expended in pursuit of the property, yet attorneys' fees will not be allowed under the guise of punitive damages. Viner v. Utrecht, 26 Cal.2d 261, 273, 158 P.2d 3.

Appellant's Authorities.

Appellant relies for recovery upon decisions of other jurisdictions. Phillips v. Liebmann, 10 App.Div. 128, 41 N.Y.S. 1020; Ordinary of State v. Connolly, 75 N.J.Eq. 521, 72 A. 363, 138 Am.St.Rep. 577; Mississippi Valley Trust Co. v. Taylor, Mo.App., 238 S.W. 558; Chase v. Faulkner, 307 Mass. 404, 30 N.E.2d 239; Wiley v. Fuller, 310 Mass. 597, 39 N.E.2d 418. Wherever any of such cases appears to lend support to appellant it is because of the phraseology or diction of the statute construed. This is exemplified in the New Jersey statute which authorizes the chancellor *to allow such counsel fees* to the successful party as he shall deem reasonable. N.J.S.A. 2:29–131. The Massachusetts statute authorizes the Supreme Judicial Court on appeal to award "expenses" out of the estate in controversy. G.L.(Ter. Ed.) c. 215, § 45. In commenting upon the McIntire and Ordinary cases the author of the note in 34 C.J.S., Executors and Administrators, § 986, page 1230, observes that "attorney's fees expended in recovering moneys improperly paid by an administrator have been held not a proper item of damages."

While the Massachusetts statute authorizes the court of last resort to award "expenses * * * to either party, to be paid by the other * * * out of the estate * * * as justice and equity may require" Chapter 215, sec. 45, General Laws, the California statute authorizes the court to "order costs to be paid by any party to the proceedings, or out of the assets of the estate". Probate Code, sec. 1232. Such language could not be reasonably interpreted to mean anything other than that the court is at liberty to exercise its discretion, decide against whom *costs* of a proceeding shall be taxed. Compensation to attorneys is left to the agreement of the parties. Code Civ.Proc., sec. 1021. Had the legislature intended that the fees of counsel employed in a contest to oust a designing administrator should be recoverable from him as a part of the costs it would have so declared. In re Estate of Olmstead, 120 Cal. 447, 454, 52 P. 804.

Appellant cites certain California decisions as persuasive of their thesis, to wit, McCormick v. Marcy, 165 Cal. 386, 132 P. 449; Nelson v. Kellogg, 162 Cal. 621, 123 P. 1115, Ann.Cas.1913D, 759; Levitzky v. Canning, 33 Cal. 299; Neeves v. Costa, 5 Cal.App. 111, 89 P. 860; Stevens v. Chisholm, 179 Cal. 557, 178 P. 128; Peebler v. Olds, 71 Cal.App.2d 382, 162 P.2d 953; Bird v. American Surety Company, 175 Cal. 6245, 166 P. 1009; Handy v. Samaha, 117 Cal.App. 286, 3 P.2d 602. Each of these cases is distinguished on its facts or it says nothing appertaining to the issue under consideration. In McCormick v. Marcy there was a warranty to defend the title to land. That contract justified an award of damages to the extent of the reasonable expense incurred by the vendee. Nelson v. Kellogg did not involve attorney's fees incurred in the *defense of an action* but merely the attorney's fees paid to procure her release from the arrest. The same was true of Neeves v. Costa. Stevens v. Chisholm was an action for malicious prosecution. Under section 3294,[3] Civil Code, the court was warranted in assessing the reasonable attorney's fees expended by the plaintiff in employing counsel and procuring sureties to obtain his release. Under the cited section the plaintiff was entitled to recover as special damage the amount he was compelled to expend or incur in his defense. If fees are not properly chargeable as damages in cases where a writ has been abused, by what process of reasoning may a ward be entitled to recover attorney's fees paid out by his guardian in a proceeding commenced on his own motion? If the attorney's fees paid by Mrs. McCallom were incurred in an action voluntarily commenced by her how can they be held to have been directly or proximately caused by an act of Hornaday? Not a single order of the Probate court allowed costs against Hornaday as guardian, but in each instance they were taxed against him personally.

[13, 14] Because the surety was responsible only for the faithful performance of such duties as were imposed by law upon the assured as guardian, there was no obligation upon him to defend against the removal proceeding. His duty which was guaranteed by the surety was to account for moneys or other movables that came to his hands. That act was complete when his successor receipted for the total inventory. Moody v. Pacific Surety Co., 41 Cal. App. 287, 289, 182 P. 802; 11B Cal.Jur., p. 930, sec. 1398.

[15] Moreover, the very contest in which Hornaday was engaged to retain his office was a personal controversy. Even though guardian of the estate, he could not collect therefrom his expenses for defending his position. If he could not charge to the estate of the minor his expense of defense, In re Estate of Schwartz, 87 Cal.App.2d 569, 574, 197 P.2d 223, why should his prosecutors collect their expenses from him?

[16] As to the obligation of the surety for acts done by Hornaday it was necessary to allege that while he was attempting to perform an official act in the line of his duties he injured the estate. Felonicher v. Stingley, 142 Cal. 630, 632, 76 P.2d 504. If he engaged in doing an act not of an official nature, it was personal. For his personal acts or thoughts or schemes the surety was not liable. If it cannot be alleged that the injury he did to the estate was committed while attempting to do an official act then the surety is not liable on its bond, Id., 142 Cal. at page 634, 76 P. 504, and the demurrer was properly sustained without leave to amend.

The appeals from the orders sustaining the demurrers to the petitions in the guardianship proceedings are dismissed; the judgments of dismissal of the two actions pursuant to the sustaining of demurrers are affirmed.

McCOMB and WILSON, JJ., concur.

On Petition for Rehearing.

PER CURIAM.

[17] In their petition for a rehearing appellants contend that it was error to dismiss their appeals from the orders sustaining Mrs. Hornaday's demurrers to the two petitions mentioned in paragraph three of the opinion on the ground that they are nonappealable. The opinion emphasizes that there was no showing in either petition that Hornaday as guardian had received assets which he had not delivered to his successor. The orders sustaining the demurrers were determinations that no facts had been alleged which would empower the court to make any order under section 1555 of the Probate Code.

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[3] "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

[18] In any event, the merits of the asserted right of appeal from the two orders are fully covered by the court's treatment of the appeals from the judgments of dismissal. No prejudice was caused by such dismissals.

The petition is denied.

Hearing denied; EDMONDS and CARTER, JJ., dissenting.

95 Cal.App.2d 463

In re BLALOCK'S ESTATE.

DRIGGS v. BLALOCK.

Civ. 17322.

District Court of Appeal, Second District, Division 1, California.

Dec. 31, 1949.

Proceeding in the matter of the estate of Lillian Grace Blalock, also known as Lillian G. Blalock, also known as Mrs. James E. Blalock, also known as Lillian Grace Mitchell, deceased. Florence Dorothy Driggs filed a petition to have purported holographic will of deceased admitted to probate, and James E. Blalock, husband of deceased, filed a contest of the will after its probate.

An order sustaining demurrer to original contest, an order granting motion to strike first amended contest, and a judgment of dismissal were entered by the Superior Court of Los Angeles County, and the contestant appealed.

The District Court of Appeal, White, P. J., dismissed attempted appeals from the orders and affirmed the judgment on the grounds that the instrument was a valid holographic will and that the first amended contest of the will seeking to attack the instrument on ground of lack of due execution was not timely filed.

1. Wills 🔑457

A technical construction of words and phrases used in will, although prima facie the one which should prevail, will not go to extent of defeating any obvious general intention of testator.

2. Wills 🔑439, 456

The objective in construction of a will should be to ascertain meaning of testator rather than meaning of words used.

3. Wills 🔑462

Where it clearly appears on face of testamentary document that maker's meaning is not completely expressed by words used, and it is also clear what words are omitted, those words may be supplied in order to carry out intention as manifest by the context.

4. Wills 🔑460, 462

In order to learn intention of testator, whole will may be scrutinized and words may be interpolated or transposed.

5. Wills 🔑462

Where testatrix in instrument sought to be probated as holographic will failed to name intended beneficiary in same sentence or paragraph in which she used dispositive words, although she named and fully described her niece in instrument, instrument would be construed as though name of testatrix' niece appeared immediately after the words "I will" in the instrument, and, as so construed, instrument was a valid holographic will. Probate Code, § 53.

6. Wills 🔑462

Conjecture and speculation cannot be indulged in to import into will something which no language used by testator warrants simply because he seems to have omitted something which it is reasonable to assume should have been provided for, but when testator has used language which can be reasonably interpreted to raise a devise or bequest, it should be so construed.

7. Wills 🔑491

The construction of a will is a question of law.

8. Wills 🔑285

Where only ground for contest alleged in original will contest was that document was not testamentary in character, amended contest which sought to attack instrument for lack of due execution added a separate ground, and was properly stricken upon showing that amendment was not filed within statutory time allowed for contest of a will. Probate Code, §§ 371, 380, 382.

9. Wills ⚷394

Attempted appeals from orders sustaining demurrer to original contest of will after probate and granting motion to strike first amended contest of will after probate would be dismissed on ground that correctness and validity of such orders were reviewable on appeal from judgment dismissing the will contest. Probate Code, § 380.

Herbert V. Walker, Los Angeles, for appellant.

Arthur H. Blanchard, Santa Paula, Robbert E. Friedrich, Santa Paula, for respondent.

WHITE, Presiding Justice.

Lillian Grace Blalock, deceased, left a purported holographic will which was admitted to probate, the respondent, Florence Dorothy Driggs, a niece of the testatrix, named in the will, being appointed administratrix with the will annexed.

The will in controversy, written upon two sheets of lined paper apparently torn from a small memorandum book, is as follows:

Sheet No. **1:**

"Last Will
Glendale, California
June 10th, 1945

Niece
Florence Dorothy
Davis (now
Mrs. Jack L. Driggs

514 Santa Paula
Santa Paula, Calif

C/o Mr. and Mrs.
Will Driggs

or c/o Father,
John Fred ~~Davis~~
Davis
212 N. Ave. 55
Los Angeles (42)
California"

Sheet No. 2:

Sig. (Aunt) Mrs. James E. Blalock
Lillian Grace Mitchell

"918 E. Acacia Ave.
Glendale 5 — Calif

My only living
relative

In case of serious
accident please ~~notify~~
notify. "
"

In case of death
I will all real
and personal
belongings
after funeral
expenses
Owe $1200.00 loan
on property
and $500.00 note sewer
Total 1700.00 @ 6 per cent
to Ann (?) B. Sinclair
00 35.00 E. 4th St.
Los Angeles (33)
California"

Shortly before the expiration of the six-months' period within which a contest of a will after its probate may be filed (Prob. Code, sec. 380), the husband of decedent filed a contest upon the sole ground "That said purported will was not at the time of its admittance to probate or at any other time, or at all, a valid will in that it does not appear therefrom that the decedent intended by said purported will itself that the property of the said decedent pass to said Florence Dorothy Driggs, the person claiming thereunder or to any other person." A general demurrer was sustained to the contest, whereupon the husband filed a "first amended contest" setting forth six grounds. A motion to strike the first amended contest was granted and thereafter a "judgment of dismissal" of the original and first amended contests was entered. The husband appeals from the order sustaining the demurrer to the original contest, the order granting the motion to strike the first amended contest, and the judgment of dismissal.

Five of the grounds contained in the first amended contest were held to be mere restatements of, or included in, the first contest filed. These grounds were stated as follows: "That said instrument so admitted to probate is not a valid will, (1) in that it is not testamentary in character. * * * (2) in that it fails to name or designate any person to take any of the estate or property of deceased thereunder. * * * (3) in that it appears from the document itself, that said deceased did not intend by said document to make any disposition of her property after her death in favor of Florence Dorothy Driggs or any other person whomsoever. * * * (4) in that, assuming it to be written and dated by the hand of said deceased and otherwise testamentary in character, it is on its face an incomplete document and that the purported signature of said deceased which appears in the margin of the first page thereof was not affixed thereto by said deceased for the purpose of execution or authentication at the end thereof as the last will of deceased. * * * (5) in that it is not a last will or testament and in that said deceased did not express in said instrument or intend thereby to make any testamentary disposition of her estate."

The ground which it is contended states a wholly new ground of contest, and being filed after the expiration of six months from the admission of the will to probate, is barred, reads as follows: "That said instrument admitted to probate as aforesaid is not a valid holographic will of said deceased in that it is not written, dated and signed by the hand of said deceased herself."

Appellant presents two points as grounds for reversal. First, that the original contest and the first amended contest "did, in each of them, state a cause of action." Under this heading it is argued: "Both the original and the amended contest of will and petition for order revoking probate contained allegations to the effect that the will was not testamentary in character, which is a question substantially affecting the validity of the will.* * * In order for a document to be the last will and testament of a deceased person it must in addition to meeting all other legal requirements, clearly show that the decedent intended it to take effect only after his death and it must satisfactorily appear therefrom that the decedent intended by the paper itself to make disposition of his property in favor of the party claiming thereunder. (Citing authorities.) * * * Applying the above quoted rule to the alleged will herein it is to be noted that it does not satisfactorily appear from the paper itself that the testatrix intended to make a disposition of her property to her niece, the party claiming under it. There are no words contained in the paper itself designating to whom the property is to be given. In other words the will does not state 'I give to' or use any other words that satisfactorily show that any person is to receive the property. * * *."

Appellant's second ground of reversal is that the ground of contest which alleged that the will was not written, dated and signed by the hand of the testatrix herself was filed within the time permitted by law. It is argued: "The subject matter of the first amended contest * * *, while it did state different grounds in addition to the grounds set forth in the contest of will after probate, was based upon the same set of facts as formed the basis of the contest of will after probate."

Taken in their entirety, the grounds stated by appellant in his original contest simply amounted to a claim that the document here in question is not a valid holographic will. If this claim be resolved against him, then the action of the trial court in sustaining the demurrer thereto must be upheld.

We are convinced that the document now before us is a valid holographic will. This we say because section 53 of the Probate Code, in part, defines such a will as "* * * one that is entirely written, dated and signed by the hand of the testator himself. It is subject to no other form, and need not be witnessed. * * *" Manifestly, the instrument before us complies therewith.

[1] Appellant's contention that the will admitted to probate does not satisfactorily show that by it the testatrix intended to make disposition of her property to her niece, is met by an examination of the will

in the light of rules of construction promulgated by the courts and the statutes of this state. The problem of the probate court, now presented to us, is to find the intention of the testatrix from the language used. In seeking such intention, there are certain well-settled principles of interpretation and construction enumerated by the courts. These principles were epitomized by our own Supreme Court in Re Estate of Peabody, 154 Cal. 173, 97 P. 184, 185, as follows: "The important thing is the intention of the testator (sec. 1317, Civil Code, now section 101, Probate Code). This is to be ascertained from the words of the will, taking into view the circumstances under which it was made (section 105, Probate Code). All parts of the will are to be considered in relation to each other so as to form, if possible, a consistent whole (section 103, Probate Code.). Words are to be taken in their ordinary grammatical sense, unless a clear intent to use them otherwise is apparent, and that sense can be ascertained (section 106, Probate Code). Technical words are not to be taken in their technical sense if it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense (section 106, Probate Code). 'A technical construction of words and phrases, although prima facie the one which should prevail, will not go to the extent of defeating any obvious general intention of the testator, since wills are often prepared by those wholly unacquainted with the precise technical force of legal formulas.' * * *"

As suggested by respondent, "It is apparent from the reading of the will that the testatrix had in mind the making of a will, the *animus testandi,* particularly when it is noted that she entitled the document her 'Last Will' and used the expression, 'In case of death I will all real and personal belongings after funeral expenses,' in the instrument. The common experience of man would dictate a presumption that the testatrix, when she wrote out her will, meant to dispose of her property and that she had an intended beneficiary in mind, and if that intended beneficiary can be reasonably ascertained from the will, then the intended beneficiary should take the property disposed thereunder.

"The problem with regard to this will it, that the testatrix failed to name the intended beneficiary in the same sentence, or paragraph, in which she used dispositive words. She did, however, name and fully describe her niece, including both the niece's maiden and married name, the niece's address, and several persons and addresses through which the niece might might be contacted. Elsewhere in the instrument and near the end thereof, the testatrix described her indebtedness, the amounts thereof, the security therefor, the person to whom the debt is owed, and the address of the creditor."

[2-4] Though it be conceded that the will here in question may not be as clear as could be desired, nevertheless, the intention that the testatrix sought to express therein can be readily ascertained. It is the rule in this state that in the construction of a will the objective should be to ascertain the meaning of the testator rather than the meaning of the words used. To that end, when it clearly appears on the face of a testamentary document that the maker's meaning is not completely expressed by the words used, and it is also clear what words are omitted, those words may be supplied in order to carry out the intention as manifested by the context. Also, in order to learn the intention of the testator, the whole will may be scrutinized, and words may be interpolated or transposed. In re Estate of Johnson, 107 Cal.App. 236, 242, 290 P. 314; Mitchell v. Donohue, 100 Cal. 202, 208, 34 P. 614, 38 Am.St.Rep. 279; In re Estate of Moorehouse, 64 Cal.App. 2d 210, 215, 148 P.2d 385; In re Estate of Goetz, 13 Cal.App. 292, 295, 109 P. 492.

[5-7] Recognizing the rules just enunciated, and applying them to the testamentary document before us, the trial court was justified in concluding that the name of respondent Florence Dorothy Davis (now Mrs. Jack L. Driggs) should be considered as placed immediately after the words "I will" as they appear in the instrument. In

re Stratton, 112 Cal. 513, 518, 44 P. 1028; In re Estate of Ottoveggio, 64 Cal.App.2d 388, 392, 148 P.2d 878. While, of course, conjecture and speculation cannot be indulged in to import into the will of a testator something which no language used by him warrants, simply because he seems to have omitted something which it is reasonable to assume should have been provided for, still, when he has used language which can be reasonably interpreted to raise a devise or bequest, it should be so construed. The construction of a will is a question of law. In re Estate of Ottoveggio, supra, 64 Cal. App.2d 388, page 391, 148 P.2d 878.

After reading the will in its entirety, and keeping in mind the general rules of construction herein set forth, we have no hesitancy in holding that the construction given the will by the probate court judge is far more reasonable than the one contended for by appellant in his contest. The demurrer interposed upon the ground that appellant's contest of will failed to state facts sufficient to constitute a ground for revocation of probate was properly sustained.

[8] We come now to a consideration of appellant's attack upon the order of the probate court by which the first amended contest of will after probate was stricken, for the reason that the same stated a wholly new ground of contest and was not filed within the time provided by section 380 of the Probate Code. The ruling of the probate court was correct. The only ground for contest alleged in the original contest was to the effect that the document was not testamentary in character. By paragraph III of the first amended contest of will hereinbefore set forth, appellant sought to add another separate and distinct ground of contest, namely, lack of due execution. The purported amendment stated a new cause of action, one to contest the will upon grounds not theretofore pleaded, and it having been filed beyond the statutory period, the court was without jurisdiction to entertain it, because the probate of the will was then conclusive as to any grounds not filed within the statutory period. Appellant's contention that while the two contests "did set forth different grounds," they were "based upon the same set of facts," is unavailing. Appellant concedes there are only four grounds for contest of a will, namely, as specified in section 371 of the Probate Code (see also section 382 of the Probate Code as affecting similarity of issues in contests after probate as in contests before probate): (1) "The competency of the decedent at the time of the execution of the will or testament." (2) "The freedom of the decedent at the time of the execution of the will from duress, menace, fraud, or undue influence." (3) "The due execution and attestation of the will by the decedent or the subscribing witnesses." (4) "Any other question substantially affecting the validity of the will."

It is manifest, as hereinbefore pointed out, that by paragraph III of the first amended contest of will after probate appellant sought to add another separate and distinct ground of contest to the grounds contained in his original contest of will after probate, namely, lack of due execution, the third enumerated ground of contest above set forth. It is settled law in this state that such an amendment is not permissible unless filed within the statutory time allowed for the contest of a will. In re Wilson's Estate 117 Cal. 262, 268, 49 P. 172, 711; In re Estate of Ricks, 160 Cal. 467, 473, 117 P. 539; In re Estate of Russell, 189 Cal. 759, 774, 210 P. 249; In re Estate of Black, 56 Cal.App.2d 796, 799, 133 P.2d 673.

[9] The attempted appeals from orders sustaining the demurrer to contest of will after probate and granting a motion to strike the first amended contest of will after probate are dismissed, for the reason that the correctness and validity of such orders are reviewable on appeal from the judgment. The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

95 Cal.App.2d 538

PEOPLE v. PRICE et al.

Cr. 4395.

District Court of Appeal, Second District, Division 1, California.

Jan. 11, 1950.

Paul E. Price and Lewis C. Price, Jr., were convicted in the Superior Court of Los Angeles County, Clement D. Nye, J., of burglary second degree, and from judgments and orders denying motions for new trial they appealed.

The District Court of Appeal, Drapeau, J., affirmed the orders denying the new trial and dismissed the appeal from the judgment holding that the evidence sustained the conviction.

1. Criminal law ⚿1023(10)

In burglary prosecution appeal from judgment must be dismissed where pronouncement thereof was suspended when probation was granted.

2. Criminal law ⚿1159(2)

If there is sufficient evidence to warrant the inference of guilt the verdict of a jury convicting defendant must be upheld.

3. Burglary ⚿42(3)

If there is corroborating evidence with possession of stolen property, a conviction for burglary must be sustained especially when the person in possession of such property fails to give any account of the manner in which it came into his possession.

4. Burglary ⚿42(1)

Evidence sustained conviction of burglary second degree of a plumbing shop where defendants made no explanation of their possession of property stolen from the shop and found in their possession.

William Moseley Jones and Robert Miller Green, Los Angeles, for Appellants.

Fred N. Howser, Attorney General, Stanford D. Herlick, Deputy Attorney General, for Respondent.

DRAPEAU, Justice.

During the night of December 30, 1948, two premises were burglarized; one a plumbing shop in Garvey, Los Angeles County; the other a trucking office at 1530 South Paloma Street, in the city of Los Angeles.

From the plumbing shop a check made by the Greeley Trailer Lodge was taken. It was to the order of the plumbing company, was received on December 30th, endorsed to the order of the bank, "to safeguard the check," and was placed in a drawer of the bookkeeper's desk. Also a number of blank checks torn from the current book of blank checks in use at the time were taken. From the trucking office a number of blank checks used by that concern were taken from their book of checks.

In the early morning hours of December 31st two motor patrol officers of the city of Los Angeles were standing at a police call box on the corner of Figueroa Street and Sunset Boulevard. A Ford coupe came along and made a left-hand turn without yielding to oncoming traffic. This drew the officers' attention, and they saw a green cloth hung over the license plate on the rear of the car. So they followed it.

The coupe stopped next to the curb a short distance from the corner, and one of the men got out. He removed the cloth from the license plate, and then got back into the car. The officers drew their guns, and came up behind, one on either side of the car. The officer on the right-hand side got behind a palm tree near the curb, with his gun trained on the two men in the coupe, and ordered them to come out with their hands up. They obeyed the order, and were placed facing an adjacent wall, hands above their heads, while one of the officers searched them and the automobile.

The following articles were found: A loaded revolver on the seat of the coupe; the blank checks stolen from the plumbing shop and the trucking office on a ledge in the car behind the seat; the green cloth which had been used to hide the license plate on the floor of the coupe. The Greeley check, with its restrictive endorsement, and the endorsement stamp of the trucking company were on the person of one of the men.

They were taken to police headquarters and locked up. Each told the officers that he was so drunk that night that he had little recollection of where he had been or what he had been doing. One said that the loaded gun was under, not on the front seat of the automobile, where the officers testified they found it. Neither had any explanation of their possession of the blank checks, the endorsement stamp, or of the Greeley check. One of them had been employed for a time at the plumbing shop; the other had been employed for a time at the trucking concern.

[1] The case was tried by jury. Neither defendant testified in his own behalf; the only evidence presented for them was as to previous good character. They were convicted of burglary second degree of the plumbing shop, and acquitted of burglary of the trucking office. They were given probation for three years, the first nine months to be spent in the county jail. From orders denying their motions for new trial they have appealed. They also purportedly appealed from the judgments. But pronouncement of judgments was suspended when probation was granted, and this appeal must be dismissed. People v. D'Elia, 73 Cal.App.2d 764, 167 P.2d 253.

Defendants contend that the conviction should be set aside for the following reasons: That there is no evidence of entry of the burglarized premises; that the evidence is insufficient to sustain their conviction; and that mere possession of stolen property is insufficient to support the conviction.

[2-4] None of these contentions may be sustained, because the evidence supports the verdict. If there is sufficient evidence to warrant the inference of guilt, the verdict of a jury must be upheld. People v. Newland, 15 Cal.2d 678, 104 P.2d 778. If there is corroborating evidence, with possession of stolen property, a conviction must be sustained, especially when the person in possession of such property fails to give any account of the manner in which it came into his possession. People v. Lang, 142 Cal. 482, 76 P. 232; People v. Platnick, 71 Cal.App.2d 767, 163 P.2d 766.

The orders denying new trial are affirmed; the purported appeal from the judgments is dismissed.

WHITE, P. J., and DORAN, J., concur.

HUFFMAN v. LINDQUIST et al.

HUFFMAN v. BELL et al.

Civ. 17029.

District Court of Appeal, Second District,
Division 1, California.

Jan. 5, 1950.

Rehearing Denied Jan. 26, 1950.

Hearing Granted March 2, 1950.*

Hilda Huffman sued Dr. C. A. Lindquist and Lutheran Hospital Society of Southern California for wrongful death of her minor son, based upon malpractice and negligence in treatment and care of plaintiff's son after he had been injured in an automobile collision. The action was consolidated for trial with another action for the wrongful death by the same plaintiff against Lonnie H. Bell and others.

Judgments of nonsuit in favor of the defendant physician and defendant hospital were entered by the Superior Court of Los Angeles County, Paul Vallee, J., and the plaintiff appealed.

The District Court of Appeal, Drapeau, J., affirmed the judgment of nonsuit as to defendant hospital but reversed the judgment of nonsuit as to defendant physician and remanded the cause for new trial, on ground that plaintiff had established a prima facie case of negligence against defendant physician.

1. Appeal and error ⚷927(3), 989

On appeal from judgment of nonsuit, appellate court may not weigh inconsistencies in evidence nor construe it other than as strongly as possible in favor of plaintiff, and all evidence in conflict with evidence favorable to plaintiff must be disregarded, and only inferences fairly deducible from the evidence and every favorable presumption arising from the facts established by plaintiff may be considered, and where evidence is susceptible of different inferences or constructions those favoring plaintiff must be accepted.

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* Subsequent opinion 234 P.2d 34.

2. Physicians and surgeons ⚷14(2)

A physician is required only to have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality and to use ordinary care in applying such skill and learning in treatment of patients.

3. Physicians and surgeons ⚷18(8)

Whether a physician has exercised the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality in a particular case can be established only by expert testimony.

4. Physicians and surgeons ⚷18(8)

The expert testimony which establishes plaintiff's prima facie case in malpractice action may be that of defendant.

5. Appeal and error ⚷1010(1)

Supreme Court will presume that defendant in malpractice action when testifying will state his case as favorably to himself as possible.

6. Appeal and error ⚷996

In reviewing judgment of nonsuit in malpractice action, where defendant's statements or inferences drawn therefrom conflicted and statements were reasonably susceptible of more than one meaning, the conflict would be resolved in favor of plaintiff and a meaning would be placed on them which was favorable to plaintiff.

7. Physicians and surgeons ⚷18(8, 9)

In action for wrongful death of plaintiff's son based upon alleged malpractice of defendant physician in treatment of son after he had been injured in automobile collision, where defendant's description of an epidural hemorrhage was sufficient to raise inference that defendant was negligent in failing to recognize that plaintiff's son was suffering from an epidural clot and authorized jury to infer that standard of care of reputable physicians in the locality required an immediate operation under such circumstances, plaintiff made a prima facie case of malpractice, and sustaining defendant's motion for judgment of nonsuit was error.

8. Hospitals ⚷8

In action against hospital for wrongful death of plaintiff's son based upon alleged negligence in treatment of son after he had been injured in an automobile collision, where record failed to disclose any causal connection between acts of alleged negligence and alleged wrongful death of plaintiff's son, sustaining defendant hospital's motion for judgment of nonsuit was not error.

Martin, Hahn & Camusi, Los Angeles, for appellant.

Chase, Rotchford, Downen & Chase, Hugh B. Rotchford and Richard T. Drukker, Los Angeles, for respondent Lindquist.

Musick, Burrell & Ingebretsen, and Anson B. Jackson, Jr., Los Angeles, for respondent Hospital.

DRAPEAU, Justice.

Plaintiff sued defendants doctor and hospital for wrongful death of her minor son, based upon malpractice and negligence in the treatment and care of said son, after he had been injured in an automobile collision. Trial resulted in judgments of nonsuit in favor of the doctor and the hospital.

The above action was consolidated for trial with another action for wrongful death arising out of the same collision, and a judgment for $3,000 was rendered against defendant John E. DeLand, as to whom a new trial was granted upon consent of plaintiff.

Plaintiff prosecutes this appeal from the judgments of nonsuit, it being contended that an analysis of the evidence considered in the light most favorable to appellant, precludes the granting of a nonsuit in favor of either Dr. Lindquist or the Santa Monica Hospital. In other words, that she made out a prima facie case of negligence which was the proximate cause of the death.

[1] As stated in Frederickson v. Kepner, 82 Cal.App.2d 905, 906, 187 P.2d 800,

801: "It is the rule that in reviewing a judgment predicated upon the granting of a motion for nonsuit an appellate court (1) is not permitted to weigh inconsistencies in the evidence, (2) is not permitted to construe the evidence other than as strongly as possible in favor of plaintiff, (3) must disregard all evidence in conflict with that in plaintiff's favor, (4) must consider every inference fairly deducible from the evidence and every favorable presumption arising therefrom as facts established by plaintiff, and (5) where the evidence is susceptible of two constructions or if several inferences reasonably may be drawn therefrom, it must take the view most favorable to plaintiff."

[2, 3] Certain general propositions applicable in malpractice actions were stated in Engelking v. Carlson, 13 Cal.2d 216, 220, 221, 88 P.2d 695, 697: "The law has never held a physician or surgeon liable for every untoward result which may occur in medical practice. It requires only that he shall have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality and that he shall use ordinary care and diligence in applying that learning and skill to the treatment of his patient. (Citation of authorities.) Whether he has done so in a particular case is a question for experts and can be established only by their testimony."

[4-6] However, it was held in Lashley v. Koerber, M.D., 26 Cal.2d 83, 89, 156 P.2d 441, 444, that "The expert testimony which establishes plaintiff's prima facie case in a malpractice action may be that of defendant. (Lawless v. Calaway, 1944, 24 Cal.2d 81, 90, 147 P.2d 604; Anderson v. Stump, 1941, 42 Cal.App.2d 761, 765, 109 P.2d 1027.) We can presume that defendant in testifying will state his case as favorably to himself as possible. (See Alper v. Tormey, 1907, 7 Cal.App. 8, 12, 93 P. 402.) * * * in reviewing a judgment of nonsuit, where defendant's statements or inferences drawn therefrom conflict the conflict must be resolved in favor of plaintiff; where the statements are reasonably susceptible of more than one meaning, that meaning is to be placed on them which is favorable to plaintiff."

Viewing the evidence in the light of the above enunciated rules, the record herein discloses the following:

Appellant's minor son, Steven Huffman, sustained a head injury and fractured skull in an automobile collision around midnight of Saturady, March 16, 1946, and was removed by ambulance from the scene to the Santa Monica Hospital, owned and operated by respondent Lutheran Hospital Society of Southern California. An intern at the hospital notified appellant about 1:00 a. m. of Sunday, March 17th, that her son had been injured. She inquired if he was the doctor in charge, and he said he was an intern, but that Dr. Lindquist took care of emergency cases. Approximately fifteen minutes later appellant arrived at the hospital where she remained in her son's room constantly, with the exception of short intervals and one two-hour period, until his death around 1:00 Monday morning.

Upon her arrival the mother found her son in the emergency room attended by Dr. Brothers, an intern, who upon inquiry told her that the doctor would be there shortly. At that time the boy was conscious and able to speak to the mother. Thereafter, around 2:30 a. m., the son was placed in a private room, at which time he was "kind of dopey" and "drowsy," not restless, and while he seemed to understand statements made to him, he did not answer.

Dr. Lindquist came around 10:00 a. m. Sunday morning, at which time when he was being examined by the doctor, the boy seemed "more unconscious" than before but was not restless; at 12:00 he was restless, hot and feverish, and when addressed by his mother, he responded; the last time the patient spoke was around 1:15 p. m. on Sunday, and the last sign of physical recognition made by the boy was around 3:00 that afternoon. At 3:45 that afternoon, the boy was very restless and feverish, was not able to understand his mother, and although not "completly unconscious," he was "very much worse." Dr. Lindquist visited the patient at 7:30 Sunday evening, felt his pulse and opened his eyes. Appellant was away from the hospital from nine until eleven o'clock Sunday evening, and upon her return noticed quite a change in the boy's condition: He was unconscious and in a coma, not moving, and was breathing very hard and labored; had developed a rattle in his throat. About 12:45 Monday morning, March 18th, the patient stopped breathing just as Dr. Lindquist came into the room and called for a respirator or pulmotor. Dr. Schetgen, the intern, brought the pulmotor but it failed to function; it was replaced, but the second one also failed to work, whereupon Dr. Lindquist turned to the intern and said: "Don't you know how to work it? * * * Doesn't anybody know how to work it?" In the meanwhile, the patient's heart was still beating perceptibly, and a third machine was procured which was used one or two minutes before Dr. Lindquist pronounced the boy dead.

The patient's sister, Mrs. Frances Machado, talked to Dr. Lindquist on the telephone at 5:00 and 7:30 p. m. on Sunday, stating she desired to have a specialist, Dr. Carl Rand, called in; that she felt her brother's condition was "very bad" and she would like something done that evening. She testified that Dr. Lindquist told her he would see what could be done the following day.

Respondent Lindquist was called as a witness under section 2055, Code of Civil Procedure, and his deposition was also read in evidence, to-wit: That the emergency service of respondent hospital called him at 1:00 or 1:30 a. m. Sunday, March 17th; that the intern he talked to thought the patient "had a possible skull fracture. He had a brain injury. He was semi-conscious. * * * I told him to have the patient admitted and to watch him, take his blood pressure every hour or two, and also his pulse and respiration, and if there was any change to report it to me * * * if he was restless to give him some phenobarital or some codeine." When he saw the boy between nine and ten o'clock Sunday morning, he was "semi-conscious, rather restless. His blood pressure * * * his pulse and temperature were within normal limits. * * * his eyes were dilated but they reacted to light." He did not prescribe different care except to order a glucose injection; that he knew then that the patient had a brain injury; also the intern stated to him that the patient had had peculiar convulsive movements of the face and scalp some time after his admission to the hospital. The witness stated he "knew the patient had some hemorrhage, whether it was epidural or subdural, when I first saw him. I did not know the extent or where the hemorrhage was, until I saw the coroner's report"; and that he first knew the patient had a depressed fracture of the skull after he saw the coroner's report. The doctor also stated that he saw the patient four times on Sunday, March 17th: between 9 and 10 o'clock in the morning, at noon, at 7:15 p. m., and around midnight; that from the time he was first assigned to the case until 7:15 p. m. of Sunday, there was not enough change in the patient's condition to warrant any change in treatment.

On direct examination by appellant, Dr. Lindquist testified that he was an M.D. and specialized in traumatic surgery; that he had been in practice and on the staff of the Santa Monica Hospital for twenty-two years; that he had assisted at operations of the brain, and when he had a brain injury case he called in a specialist if the condition of the patient warranted it; that a brain injury is usually accompanied by dilatation of the pupils of the eyes which is also one of the symptoms of an epidural hemorrhage; that when he examined the patient at 10:00 Sunday morning, the pupil of his right eye was slightly dilated; that he found a suggestive Babinsky which was indicative of brain injury.

In answer to the question: "What other factors do you take into consideration in determining whether or not there is epidural hemorrhage?" the witness stated: "I take into consideration whether he is getting any increased intracranial pressure, which is the usual sign, as they become gradually more unconscious, go into a deep stupor, their blood pressure climbs way high with a slowing of their pulse * * * the respirations get slower, and that pupil then generally becomes dilated completely, right out to the rim, and it is fixed, you cannot make it contract with any amount of light you wish to put in it." Further, "As a general rule, from all I can find out in talking to neurosurgeons, when a pupil will react to light, it is not serious." In discussing the classical picture of an epidural hemorrhage, this witness stated that in the majority of cases the patient is (1) unconscious; (2) lucid; (3) gradually unconscious. He explained that an epidural hemorrhage is one between the bony vault of the brain and the dura, which is the tough membrane surrounding the brain.

The witness' attention was called to the recital in the autopsy report that the patient had "an epidural hemorrhage 1.5 cm. thick." He was then asked by appellant's counsel: "All right, Doctor, let us assume that you have a case of epidural hemorrhage, and is it not true that if the bleeding continues and no operation is made to clean out that clot, open the brain, the patient will surely die?" After objection thereto had been overruled, the doctor replied: "Certainly if the hemorrhage continues to make that clot big enough to create enough pressure on your brain, you are going to die, surely."

[7] Respondent doctor's description of the symptoms of an epidural hemorrhage was sufficient to raise the inference that he was negligent in failing to recognize that the patient was suffering from an epidural clot. Moreover, it is manifest from his statement that if an epidural clot creates enough pressure on the brain, the patient will die, the jury could infer that the standard of care of reputable physicians in the locality required an immediate operation to relieve the pressure in an effort to save the patient's life.

While it is true that Dr. Lindquist did not expressly refer to the practice followed by other doctors in the community, nevertheless, as stated in McCurdy v. Hatfield, 30 Cal.2d 492, 495, 183 P.2d 269, 271: "* * * he did testify as to what was proper practice, and it is reasonable to infer that his testimony was based on the standard of care used by physicians in the locality. If he failed to conform to the proper practice as set forth in his testimony, he did not act as a reasonable physician should under the circumstances."

Respondent argues that "the cause of death, as established by the evidence, was a pulmonary embolism." The death certificate recites the immediate cause of death as "Pulmonary Embolism," such certificate further recites that the immediate cause of death was "Due to Cerebral contusion and hemorrhage. Due to Fracture of skull."

Appellant contends that the embolism was a terminal matter which developed when the patient was about to die and was due to the increased intracranial pressure caused by the epidural clot. Respondent doctor testified that an embolism is usually fatal in a very few minutes, and in answer to the question: "You gave some of the reasons for pulmonary embolism, Doctor. Now, isn't a very common reason really that pulmonary embolism is a terminal factor, by that I mean, in any type of case where you have a patient that is in pretty bad condition, and is about ready to die, an embolism may develop?"—Dr. Lindquist replied: "It may be, but I don't say that that is the thing, I am not enough of a pathologist to answer that, I don't know that."

Since it is apparent that appellant has established a prima facie case of negligence against respondent Doctor Lindquist, the nonsuit as to him should not have been granted.

[8] Appellant also urges that respondent hospital was negligent in various respects: (1) in assuring her that Dr. Lindquist would immediately attend her son, while in fact he did not see him for some eight or nine hours later; (2) the failure of the pulmotors to function and (3) carelessness of the interns and nurses in keeping records of the patient's condition.

An examination of the record on this phase of the case does not disclose any causal connection between such acts of alleged negligence and the alleged wrongful death of the appellant's son. Hence, there was no error in granting the motion of nonsuit in favor of respondent hospital.

For the reasons stated, the judgment of nonsuit as to respondent hospital is affirmed; the judgment of nonsuit as to respondent Dr. C. A. Lindquist is reversed, and the cause remanded for a new trial.

WHITE, P. J., and DORAN, J., concur.

95 Cal.App.2d 489

PEOPLE v. GARNIER.

Cr. 682.

District Court of Appeal, Fourth District, California.

Jan. 5, 1950.

Hearing Denied Feb. 2, 1950.

Agnes Elizabeth Garnier was convicted in the Superior Court for Riverside County, Russell S. Waite, J., of manslaughter, and she appealed from the judgment and from an order denying a new trial.

The District Court of Appeal, Griffin, acting P. J., affirmed the judgment and order, and held that the giving of certain instructions relating among other things to the corpus delicti, excusable homicide, and passion referred to in the law of manslaughter was not prejudicial error. The court also found that the cross-examination of defendant interfered with no constitutional rights, and that sufficient prima facie proof of the corpus delicti was shown to permit admission of defendant's extra-judicial statements.

1. Homicide 🔑112(5)

Right of self-defense is not available to a person who has sought a quarrel with design to force a deadly issue, and thus through his fraud, contrivance or fault, to create a real or apparent necessity for making a felonious assault.

2. Criminal law 🔑1186(4)

In murder prosecution, where evidence made it difficult to determine whether defendant relied on claim of self-defense, accidental shooting or self-inflicted wound, giving of abstract instruction that right of self-defense is not available to person who seeks quarrel to force a deadly issue was not prejudicial in view of other instructions on law of self-defense and fact that defendant was convicted only of manslaughter. Const. art. 6, § 4½.

3. Criminal law 🔑814(1)

In criminal prosecution, court should not state a principle of law which has no application to facts of the case.

4. Criminal law 🔑1186(4)

In murder prosecution, where court charged that even though death was accidental and not intended, and anticipated homicide will not be excused if caused by "an unlawful act or by doing of a lawful act which might produce death in an unlawful manner," giving of quoted portion of instruction was not prejudicial error in view of evidence supporting conviction for manslaughter under other alternatives of the instruction. Const. art. 6, § 4½.

5. Criminal law 🔑781(4)

In murder prosecution, instruction that guilt of defendant may not be established alone by any statement made by her outside of the trial, and that before conviction there must be proof independent of any such statement that crime was committed, was not objectionable as informing jury that corpus delicti may be established in part by extra-judicial statements of defendant.

6. Criminal law 🔑823(17)

In murder prosecution, instruction to effect that neither passion of fear, of itself, nor other described passions alone constitute heat of passion referred to in law of manslaughter was not objectionable as misleading in view of other given instructions.

7. Criminal law 🔑823(1, 2)

In murder prosecution wherein defendant was convicted of manslaughter, instruction that jury had to agree unanimously not only as to innocence or guilt, but also as to degree of offense if defendant were found guilty was not objectionable as misleading or as assuming the fact that defendant was guilty of some crime in view of other given instructions.

8. Criminal law 🔑823(14)

In murder prosecution, instruction that defendant could not be convicted on circumstantial evidence "alone" unless proved circumstances were consistent with hypothesis of guilt and were irreconcilable with any other rational conclusion was not objectionable for use of quoted word in view of other given instructions.

9. Witnesses 🔑277(3)

Where defendant accused of murder took stand and read letters to show decedent's affection for her, and denied claim that she had stated her hate for decedent to others, prosecution could cross-examine defendant to elicit admission that defendant quarreled with decedent shortly before killing, and could show that her statements of hate had been made. Pen.Code, § 1323; Const. art. 1, § 13.

10. Criminal law ⚷1036(1), 1044

Where defendant accused of murder made no objection to certain rebuttal testimony, and made no motion to strike it out, defendant could not complain of such testimony for the first time on appeal.

11. Criminal law ⚷406(1), 517(4)

The corpus delicti need not be established beyond a reasonable doubt to permit introduction of admissions of defendant; and extra-judicial statements, admissions or confessions may be admitted in evidence upon prima facie proof of the corpus delicti.

12. Criminal law ⚷412(1)

In murder prosecution, evidence that bullet which killed decedent was fired by gun found in bedroom, and that muzzle was held a short distance from body when gun was discharged and that defendant had been quarreling with decedent and was in the room where killing occurred shortly thereafter sufficiently established the corpus delicti to permit introduction of defendant's extra-judicial statements.

Sam Houston Allen, Los Angeles, William W. Shaw, Riverside, for appellant.

Fred N. Howser, Attorney General, Dan Kaufmann, Deputy Attorney General, William O. Mackey, District Attorney, Riverside County, Riverside, for respondent.

GRIFFIN, Acting Presiding Justice.

Defendant was indicted for the murder of one John E. Owen on April 22, 1949. The jury found her guilty of manslaughter, an included offense. After denying defendant's motion for new trial and a motion in arrest of judgment, defendant appealed.

The appeal is based upon the following grounds: (1) that the trial court improperly instructed the jury; (2) that the court erred in allowing the defendant to be cross-examined on matters not covered in her direct examination; (3) that the court erred in permitting the prosecution to introduce improper rebuttal testimony; and (4) that the jury's verdict was contrary to the evidence in that the corpus delicti was not established prior to the admission into evidence of the extrajudicial statements of the defendant.

The defendant (aged 52) was the resident manager of an apartment house in Los Angeles, owned by the deceased, Mr. Owen. She met him in 1936, at which time she was employed by him. He was about 68 years of age, was married, but had separated from his wife temporarily in 1937, and after a reconciliation, separated permanently from her in 1944.

About 3 o'clock in the afternoon on April 22, defendant and the deceased left the apartment house bound for his ranch in West Riverside. Prior to their leaving they had engaged in an argument which was overheard by various persons, and during the course of this argument defendant applied coarse epithets toward him. They departed in the deceased's car and on arrival at the ranch were met by a Mrs. Austin, an employee of the deceased. After their arrival, the deceased proceeded to his bedroom downstairs. Defendant proceeded to the guest room in the upstairs portion of the house. After changing her clothes she seated herself in the lanai room. Mr. Owen came upstairs and proceeded to the bar where he poured himself a drink. Defendant began to quarrel with him about his drinking. He showed her certain drinking glasses which he had received as a present which defendant believed were sent to him by another woman. Some verbal altercation ensued. Defendant told Mr. Owen that she was going home and he threatened her that if she went home he would fire her. One of the ranch hands was called and asked to drive her to Los Angeles. A few minutes later deceased stated he was going to bed and proceeded downstairs through the hallway stairs. Defendant followed him and remained at the bottom landing watching Mr. Owen's shadow in his bedroom. When she no longer saw him moving around she went in and found him sitting in a chair. The deceased had a Colt Army Special 32-20 gun which he kept on a small table in his bedroom. According to the people's evidence the servant, Mrs. Austin, who was upstairs, heard defendant say something about a gun and she heard one discharged. She testified that defendant came upstairs and said: "I shot Mr. Owen", whereupon she rushed downstairs, followed by defendant, and found him lying on the floor in the bedroom, and that defendant said: "Well, he tried to shoot me and I shot him". A ranch hand, deputy sheriffs and a physician were summoned. The ranch hand, according to his story, proceeded down the stairs and as he passed defendant he asked her what had happened and she said: "I just shot the boss". Defendant was then sitting in a chair next to the bed and looked very calm and very cool. Her hair was in order and her clothing was all neat. Defendant told him that she and Owen had gone downstairs and that the "boss" had tussled with her; that she had lost an ear-ring; that he had threatened her with a gun; that the deceased threw the gun down on the bed, walked away, and that she picked it up and called to him to stop; that the deceased turned around and faced her and laughed and started to walk away; and she shot him. He found the gun lying on the bed with one discharged shell.

A deputy sheriff testified that when they arrived they found defendant sitting in a chair and that he asked her what happened and she replied that Mr. Owen came at her with a gun and she took it away from him and hit him with it; that she didn't know anything about guns and that she didn't know that she ever had one in her hand before. He testified that as they were leaving the premises defendant told him: "I had to do it, it was either him or me"; that Mr. Owen was drunk and hit her several times and knocked one of her earrings off; that defendant stated that "where she was going it probably wouldn't make any difference whether she had an earring or not."

Later in the evening she made a statement to Deputy Sheriff Vivion, in which she related that she and the deceased left Los Angeles at 3 o'clock in the afternoon and on their arrival at the ranch a conversation ensued in which the name of an actress was mentioned repeatedly; that deceased recounted to her some of the parties he had attended in New York at the time he was there and referred to some drinking glasses he had received as a present from New York; that she was not interested in the glasses and did not wish to continue the conversation; that Mr. Owen told her he was going to send her back to Los Angeles and that she would be discharged; that he continued with his drinking and later started down to his bedroom; that she followed immediately behind him and that he was staggering considerably; that he sat down in a chair in the bedroom and she went in and turned down the covers to the bed, which was her customary habit; that he became angry and abusive; that she retired from his room and on her return he was standing on the west side of his bed with the revolver in his hand; that he told her he would shoot her; that she went around the bed and approached him and took the revolver from his hand; that when Mr. Owen saw that she had taken the revolver from him he started away and at that time she heard a report and he fell to the floor; that she did not go to his aid because he had feigned sinking spells in order to gain her sympathy on other occasions; that when he did not arise she tossed the gun on the bed and left the room for the purpose of obtaining aid; that she did not know what happened when the gun was discharged.

Vivion testified that on April 22 he found an earring in the pocket of a shirt hanging on the door opening from the office section into the bedroom of Mr. Owen, and that it was similar to the earring taken from the defendant. In the possession of the defendant at the time of her booking were two typewritten sheets and a small clipping from a newspaper. The typewritten matter consisted of the recital of the activities of Mr. Owen on his trip to Washington, his association with an actress appeared prominently in these recitals. It mentioned an argument between the deceased and defendant before he left for Washington and the fact that he was finding fault with everything she did and that defendant was checking his activities on his trip to New York.

At the trial a group of witnesses testified to conversations with defendant in which she indicated her dissatisfaction with her association with Mr. Owen, her fear of discharge, her reluctance to lose that association, and more particularly, her position. She mentioned taking a course in real estate and that she was going to leave his employ; that she had been working for him about 15 years and was not getting any younger, and stated: "If I can't have him nobody else will"; and that one witness heard her say to Mr. Owen: "You will either marry me or pay me off"; that "* * * he will have a ——— of a time getting rid of me. I am not that easy to get rid of". There is testimony by one witness that in a conversation with defendant in June, 1948, defendant inquired about acquiring a gun for her protection; that in a conversation with one of the clerks at the Dubarry Apartments about two months prior to the trial defendant told him she was going to have a "showdown with the boss" when he came back, that she was getting sick of it.

It was stipulated that the bullet which killed Mr. Owen was fired from the gun found in the bedroom. The caretaker had left it there loaded but had removed one shell in the chamber immediately opposite the hammer. There was testimony that showed that a single action "pull" (fired from the cocked position) required a pull of 5-½ pounds, and that a double action "pull" (pulled on trigger) required a pull of 13 pounds. The medical testimony shows that the bullet entered his body on the left side at about the eighth rib and traveled slightly upward, emerging at the sixth rib on the right side, and that the muzzle of the gun was approximately 12 inches from the point of entry at the time the gun was discharged.

At the trial, on direct examination, defendant, without further explanation, adopted the story which she told deputy sheriff Vivion, as her version of what took place in the bedroom on the evening Mr. Owen lost his life. She then introduced a large amount of correspondence from Mr. Owen to her during the latter years of her employment, for the purpose of showing the attitude and relationship between them. On cross-examination, her testimony was somewhat at variance with the story related to deputy sheriff Vivion. She stated that when she entered the bedroom Mr. Owen's eyes were closed and he appeared to be going to sleep; that she started to take his shoes off and this made him angry; that she reached for his glasses and he started slapping her and cursing her and hitting her on both sides of her face with both hands as hard as he could and that she pushed him back into his chair when he started to arise; that when she turned he arose and said: "I am going to kill you"; that he had the gun in his hand; that she grabbed it out of his hands and the next thing she knew she was standing up and the gun was up in the air pointed to the ceiling and that her arm that was holding it seemed to be frozen and that she could not move it; that she grabbed her arm and pulled it down, the gun was discharged, and Mr. Owen was on the floor. She stated that Mr. Owen had abused her verbally when he threatened her. She denied the conversations claimed to have been had with her by the witnesses who testified for the prosecution. She denied ever having a gun in her possession before, or ever carrying one in her purse. She stated that Mr. Owen was going to meet his wife and make arrangements for a settlement and a divorce from her.

The prosecution, on rebuttal, introduced the testimony of several witnesses indicating that the reputation of the defendant for truth and veracity in the community was bad, and produced a witness indicating that defendant was carrying a gun in her purse on a previous occasion, notwithstanding defendant's denial of this fact, "for the protection of Mr. Owen". Defendant then proceeded to introduce a letter from Mr. Owen dated April 19, 1949, in which he acknowledged his love for her. The parties rested their case.

At the request of the people, the court instructed the jury that "The right of self-defense is not available to a person who has sought a quarrel with the design to force a deadly issue and thus, through his fraud, contrivance or fault, to create a real or apparent necessity for making a felonious assault, for in such a case the original intent would control."

It is argued that even though the instruction correctly stated an abstract principle of law, there was no evidence that defendant instigated a quarrel or "sought a quarrel" for any purpose whatsoever and therefore the instruction was not applicable and it was prejudicial error to give it, citing such cases as People v. Campanella, 39 Cal. App.2d 384, 103 P.2d 193; People v. Keys, 62 Cal.App.2d 903, 145 P.2d 589; People v. Conkling, 111 Cal. 616, 44 P. 314; People v. Hatchett, 63 Cal.App.2d 144, 146 P.2d 469; and People v. Huntington, 138 Cal. 261, 70 P. 284.

The evidence clearly discloses that defendant and deceased had been quarreling since 3 o'clock on the day of the shooting. As suggested, the quarrel had reached such a point that the status of defendant's position as an employee of the deceased was left considerably in doubt. Mr. Owen, after the quarrel, proceeded downstairs and there was no apparent necessity for defendant to follow him to his bedroom. She was free to leave at any time. In fact, the ranch hand had been called by deceased to take her back to Los Angeles. This was some evidence, though slight, from which the jury might have believed that the defendant followed the deceased to his room for the reason of provoking a further quarrel. However, it does not reasonably appear that it was for the purpose of "forcing a deadly issue".

It is difficult to determine whether the defendant in this action was relying upon the claim of self-defense, accidental shooting, or that the wound was self-inflicted. She testified that she was not afraid of the deceased when the gun was in his possession; that she took it from him with very little difficulty and that he had been drinking and he was "like a baby" and was "easy to handle".

[1, 2] The instruction, as given, concededly was proper in form, as an abstract principle of law. People v. Hinshaw, 194 Cal. 1, 227 P. 156; CALJIC Inst. No. 325, p. 302. Under the facts brought out in People v. Hinshaw, supra, such an instruction was proper. Applying the instruction, as given, to the facts in the instant case, the evidence may have fallen short of establishing all of the facts necessary to be established. Considering the weakness of the evidence on the question of self-defense, and in view of the fact that the jury was otherwise fully instructed on the law of self-defense and that defendant was convicted only of the lesser offense of manslaughter, it does not seem reasonable to suppose that a miscarriage of justice, under the provisions of sec. 4-½ of Article VI of the Constitution resulted by reason of the giving of such an abstract instruction or that the jurors were thereby led into error in arriving at such a verdict. People v. Keys, 62 Cal.App.2d 903, 145 P.2d 589; People v. Glover, 141 Cal. 233, 74 P. 745; People v. Soules, 41 Cal.App.2d 298, 106 P.2d 639.

The trial court gave an instruction on excusable homicide in the language of CALJIC Instruction No. 320, p. 289, to the effect that:

"The killing of a human being is excusable and not unlawful: 1. When committed by accident and misfortune in doing any lawful act by lawful means and without any unlawful intent, and where the person causing the death acted with that care and caution which would be exercised by the ordinarily careful and prudent individual under like circumstances. 2. When committed by accident and misfortune in the heat of passion upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken nor any dangerous weapon is used, and when the killing is not done in a cruel or unusual manner.

"Excusable homicide is distinguished from felonious homicide in that to be excusable the killing of the human being must have been by both accident and misfortune. *Even though* the death was accidental and may not have been intended and was not anticipated, the homicide will not be excused if it was caused by *an unlawful act*, or by the doing of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

[3, 4] Defendant complains of the italicized portion and claims that there was no evidence from which the jury could have found her guilty of involuntary manslaughter arising from an *unlawful act* on her part, citing People v. Sanchez, 30 Cal.2d 560, 184 P.2d 673. It is true that only that portion of the above-quoted instruction should be given which is applicable to the evidence in the case. As stated in People v. Sanchez, supra, the court should not state a principle of law which has no application to the facts of the case. However, in the instant case, there is sufficient evidence to support a conviction of manslaughter under the other alternatives mentioned in that same paragraph. The giving of the portion of the instruction complained of is not prejudicial error under the facts of the case. People v. Sanchez, supra.

The next complaint involves an instruction given as follows: "Corpus Delicti Must First Be Proved. The guilt of a defendant may not be established *alone* by any statement made by her outside of this trial. Before any person may be convicted of a criminal offense, there must be proof, independent of any such statement, that the crime in question was committed * * *."

[5] It is defendant's contention that this instruction tells the jury that the corpus delicti may be established *in part* by extra-judicial statements of the defendant, whereas, the true rule is that there must be proof, independent of any such statement, *sufficient of itself,* to establish that the deceased met death through a criminal agency, citing People v. Hudson, 139 Cal.App. 543, 34 P.2d 741; People v. Tugwell, 28 Cal. App. 348, 152 P. 740; and People v. Ives, 17 Cal.2d 459, 110 P.2d 408. The instruction, as given, is substantially that prescribed in CALJIC Instruction No. 29C, Alternate, p. 44, and is clearly in accord with the rules laid down in People v. Selby, 198 Cal. 426, 245 P. 426; People v. McMonigle, 29 Cal.2d 730, 177 P.2d 745; People v. King, 30 Cal.App.2d 185, 85 P.2d 928; People v. Hammond, 26 Cal.App.2d 145, 78 P.2d 1172; and People v. Ives, supra, cited by defendant.

The court gave the instruction found in CALJIC, No. 311-A, p. 276, respecting the fact that neither the "passion of fear", of itself, nor other described passions, in and of themselves "constitute the heat of passion referred to in the law of manslaughter * * *." This was followed by an instruction distinguishing manslaughter from murder and stating that "The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances", and that "A defendant is not permitted to set up his own standard of conduct and to justify or excuse himself because his passions were aroused unless the circumstances in which he was placed and the facts that confronted him were such as also would have aroused the passion of the ordinarily reasonable person if likewise situated", which instruction is in the language of CALJIC No. 311, Alternate, p. 275.

[6] Defendant argues that "fear is an emotion" and "has nothing to do with passion"; and that the statement used must have confused the jury, and that by the instruction, as given, the jury was told that as a matter of law the conduct of defendant could not be justified by "the reason of fear, of itself". Webster's New International Dictionary, in defining passion, includes *fear,* hate, love and joy within its definition, and also includes violent and intense emotions. When the entire instruction, of which defendant complains, is considered it is clear that it is complimentary to the preceeding instruction which gave to the jury the test for heat of passion and, as given, it is a correct statement of the law and was properly given. It sufficiently covered the proffered instruction offered by defendant and refused. People v. Logan, 175 Cal. 45, 49, 164 P. 1121; People v. Valentine, 28 Cal.2d 121, 139, 169 P.2d 1; Horton on Criminal Law, Vol. 1, p. 648.

[7] The next complaint involves an instruction as follows: "Before you may return a verdict in this case, you must agree unanimously not only as to the innocence or guilt of the defendant, but also, if you should find her guilty, as to the *degree* of

her offense." This was followed by an instruction: "If you find that a defendant was guilty of an offense included within the charge of the indictment, but entertain a reasonable doubt as to the degree of the crime of which *she is guilty,* it is your duty to convict the defendant only of the lesser offense." Defendant claims that there is no degree where manslaughter is involved and therefore the instruction was erroneous to that extent; that the second portion of the instruction, as worded, assumed as a fact that defendant was guilty of some crime. It is obvious, from the arrangement of the instruction, as given, pertaining to the first complaint, that the court was referring to the charge of murder. Considering the instructions as a whole, the jury could not have been misled. Likewise, the second portion was fully covered by proper instructions which fully developed the true import of that instruction. No error was committed and no prejudicial error resulted. People v. Latona, 2 Cal.2d 714, 727, 43 P.2d 260; People v. Swift, 66 Cal. 348, 5 P. 505; People v. McGee, 31 Cal.2d 229, 187 P.2d 706.

[8] The last instruction objected to recites that: "I instruct you further that you are not permitted, on circumstantial evidence *alone,* to find the defendant guilty of the crime charged against *him,* unless the proved circumstances not only are consistent with the hypothesis that the defendant is guilty of the crime, but are irreconcilable with any other rational conclusion." This instruction appears in CALJIC, Instruction No. 27, p. 30. In connection therewith CALJIC Instruction No. 28, p. 31, was also given on the same subject. The defendant's complaint of the first instruction is that the court was in error in using the word "alone" (italicized), and that the instruction, as given, should have stated that if "any part of the evidence" is circumstantial, the trial court is obligated, on its own motion, to give such an instruction as was proffered by her in the language suggested in the case of People v. Bender, 27 Cal.2d 164, 163 P.2d 8. It is true that in that case the word "alone" is not used. The holding is that where "circumstantial evidence is substantially relied upon" for proof of guilt, an adequate instruction is required. The two instructions, as given, sufficiently cover the subject-matter and are not prejudicially erroneous. People v. Koenig, 29 Cal.2d 87, 93, 173 P.2d 1; People v. Bender, supra; People v. Owens, 79 Cal. App.2d 290, 297, 179 P.2d 401.

[9] The next point raised is that by the cross-examination of the defendant her constitutional rights were interfered with and she cites Sec. 13, art. I of the Constitution and People v. Arrighini, 122 Cal. 121, 54 P. 591. Defendant was on the witness stand for approximately two days and practically all of her testimony was devoted to reading into evidence scores of letters written to her over a period of years by the deceased. She then testified that what she told officer Vivion as to what transpired in Mr. Owen's bedroom on the evening he lost his life substantially correct. On cross-examination the prosecution sought to elicit from her an admission that she and the deceased had quarreled prior to their departure for Riverside that afternoon. Counsel for defendant objected on the ground that it was not proper cross-examination and the court overruled the objection. Defendant contends that the cross-examination was limited to what occurred in Mr. Owen's bedroom on that evening and that therefore the objection should have been sustained. There is no merit to this contention. Section 1323 of the Penal Code provides that a defendant in a criminal action or proceeding cannot be compelled to be a witness against himself, but if he offers himself as a witness he may be cross-examined by counsel for the people as to all matters on which he was examined in chief. The letters covered a period of several months time and were offered for the purpose of establishing the deceased's affection for and devotion to her over this period of time. The examination was therefore relevant. She was likewise interrogated as to her conversations with other people during this period in which she allegedly stated that "I hate Mr. Owen and I will never marry him." Such statements as that were offered for the purpose of impeaching some of the contents of the letters written to the defendant by the deceased and which were introduced by her on direct

examination. The relationship of the defendant and the deceased was material on the question of motive and this fact was recognized by both the prosecution and by the defense by the letters which she had introduced in her case in chief. It was proper to show that she made prior contradictory and inconsistent statements concerning the question of her motive. She chose to deny the claimed conversations with others and the prosecution was properly allowed to subsequently show that such conversations had in fact taken place. People v. Tuthill, 31 Cal.2d 92, 99, 187 P.2d 16.

[10] It is next claimed that the trial court erred to defendant's prejudice in permitting the prosecution to introduce improper rebuttal testimony. It is claimed that Florence Owen, wife of the deceased, was called as a "rebuttal witness" for the single purpose of endeavoring to persuade the jury that the defendant had broken up an erstwhile happy relationship between herself and the deceased. This witness was first called on behalf of the prosecution. She merely identified the body of her husband as the same person mentioned in the indictment. As a rebuttal witness, she testified, without objections, in reference to the date of their claimed separation, which date was somewhat at variance with that testified to by the defendant. The witness was then thoroughly cross-examined as to her relationship with Mrs. Garnier, the defendant. Other rebuttal witnesses were produced to impeach the testimony of the defendant elicited on cross-examination as to certain statements she denied making to these particular witnesses. No objection was ever made to this particular testimony, no motion was made to strike it, and it appears that the complaint as to this rebuttal testimony was made for the first time on appeal. Under the circumstances, no prejudicial error may be claimed. People v. Guiterez, 126 Cal.App. 526, 530, 14 P.2d 838; People v. Lewandowski, 143 Cal. 574, 579, 77 P. 467.

[11, 12] Lastly, the complaint that the evidence did not, as a matter of law, support the verdict of the jury for the reasons stated, is untenable. It seems to be the argument of defendant that in the absence of her extrajudicial statements, the evidence before the jury and the court could only warrant a conclusion that the wound which the deceased received was either self-inflicted, or was occasioned by accident. It is now well settled in this state that the corpus delicti need not be established beyond a reasonable doubt in order to permit the introduction of admissions of the defendant, and such extrajudicial statements, admissions or confessions may be admitted in evidence upon prima facie proof of the corpus delicti. People v. McMonigle, 29 Cal.2d 730, 738, 177 P.2d 745; People v. Seymour, 54 Cal.App.2d 266, 275, 128 P.2d 726; People v. Day, 71 Cal.App.2d 1, 3, 161 P.2d 803; People v. Ford, 85 Cal.App. 258, 260, 258 P. 1111; People v. Grill, 151 Cal. 592, 595, 91 P. 515; People v. Searle, 33 Cal.App. 228, 231, 164 P. 819. There was sufficient prima facie proof of the corpus delicti shown.

Judgment and order affirmed.

MUSSELL, J., concurs.

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95 Cal.App.2d 472

PEMBERTON v. PEMBERTON.

Civ. No. 3898.

District Court of Appeal, Fourth District California.

Jan. 3, 1950.

Hearing Denied March 2, 1950.

Robert F. Pemberton brought action for divorce against Dora Pemberton, and plaintiff was ordered in such action to pay $25 a month for support of a minor child.

Thereafter the defendant, as judgment creditor, filed a motion for leave to file a claim against the estate of the deceased plaintiff, based on accumulated judgment and accrued interest, and the Superior Court of Riverside County, Russell S. Waite, J., entered an order in favor of the defendant, and the executrix of the estate of plaintiff appealed.

The District Court of Appeal, Griffin, Acting P. J., affirmed the order and held that allegations of affidavits were sufficient to justify consideration of their merits, that defendant was entitled to execution as a matter of right for all installments accruing within five years from date of application therefor, and that evidence sustained finding that defendant was entitled to accrued installments which had accrued more than five years prior to application, and that certain items were properly disallowed in determining amount due defendant.

1. Divorce 🔑311

On motion by former wife in divorce proceedings for execution to enforce judgment against estate of deceased former husband, for unpaid money for support of son, allegations of affidavits that wife had caused a complaint to be filed against husband for nonsupport of son, that complaint was dismissed on promise of husband to support son, that she was compelled to support son, that she was constantly told by husband that he had no funds, and that subsequently wife sought to collect support, but husband could not be located, were sufficient to justify consideration of their merits. Code Civ.Proc. § 685.

2. Execution 🔑73

Under statute relating to issuance of execution more than five years after entry of judgment, court may grant a judgment creditor leave to enforce his judgment by presenting the claim against debtor's estate, and by bringing an action thereon if the claim is rejected. Code Civ.Proc. § 685.

3. Execution 🔑73

Under statute relating to issuance of execution more than five years after entry of judgment, an order granting judgment debtor leave to enforce his judgment by presenting claim against debtor's estate is subject to the same rules applicable to one which authorizes issuance of execution more than five years after judgment was entered. Code Civ.Proc. § 685.

4. Execution 🔑73

Under statute relating to issuance of execution more than five years after entry of judgment, order may be made only if, during five years following entry of judgment, execution creditor exercised due diligence in locating and levying on property owned by debtor, or in following available information to point where a reasonable person would conclude that there was no property subject to levy within that time. Code Civ.Proc. § 685.

5. Execution 🔑73

Purpose of amendment to statute relating to issuance of execution more than five years after entry of judgment was to place on creditor seeking to enforce an old judgment, burden of showing why he was not able to satisfy his claim within the five year statutory period during which he was entitled to execution as a matter of right. Code Civ.Proc. §§ 681, 685.

6. Execution 🔑75
Executors and administrators 🔑202(1)

Judgment creditor was entitled to execution as a matter of right and to file a claim against estate of deceased judgment debtor for five years' accumulation due from judgment debtor immediately preceding application of judgment creditor to enforce the judgment. Code Civ.Proc. § 681.

7. Appeal and error 🔑983(3)

On appeal by executrix of deceased judgment debtor from order that judgment be enforced against estate by execution as to all accrued installments for support, though accruing more than five years prior to application, question for District Court of Appeal was whether there was any sufficient showing of due diligence of executrix which might reasonably justify order and preclude Court from saying that trial court abused its discretion. Code Civ. Proc. §§ 681, 685.

8. Divorce 🔑311

Evidence sustained order for enforcement by execution of judgment in divorce suit for installments accruing more than five years prior to time of application for execution, on ground that due diligence had been made to collect the judgment without success, notwithstanding that there were in evidence former husband's canceled checks endorsed by former wife at times when she contended that she did not know of his whereabouts and was unable to enforce judgment. Code Civ.Proc. § 685.

9. Appeal and error ⚷1011(1)

District Court of Appeal cannot disturb findings of trial court on conflicting evidence.

10. Divorce ⚷311

On application in divorce action by former wife for execution on judgment for support of son, evidence sustained finding that checks which had been made payable to former wife by former husband and which were endorsed by former wife and in part by son, were paid over to son for his personal benefit and not in application on judgment. Code Civ.Proc. §§ 681, 685.

◆

Leslie S. Bowden and Morris McLaughlin, Los Angeles, for appellant.

Harold A. McCabe, Fullerton, for respondent.

GRIFFIN, Acting Presiding Justice.

In 1927, Robert F. Pemberton brought an action for divorce against his wife, Dora Pemberton, on the grounds of extreme cruelty. Custody of their minor child, Robert, aged one year, was given to the mother of defendant. Plaintiff was ordered to pay $25 per month for his support. There is no mention or disposition made of any community property. On September 1, 1928, defendant applied for change in custody of the child to her. The husband, Robert F. Pemberton, answered her affidavits and the order to show cause, and upon proper showing she obtained custody by modified decree entered September 28, 1928. By it the husband was ordered to pay $25 per month for the child's care to the Citizens Bank of Corona. The father made no payments under the order except such claimed payments as will hereinafter be discussed. He died on July 24, 1948.

Defendant wife, as a judgment creditor, on October 29, 1948, filed a motion for leave to file a claim against the estate of deceased, based on the accumulated judgment and accrued interest, on the ground that the judgment was wholly unsatisfied and that the judgment creditor could not, with reasonable diligence, secure payment of the same within five years following its rendition.

The affidavits of defendant supporting the motion, in addition to the above-stated facts, show that the minor child, ever since the entry of said judgment, up to his attaining the age of 21 years on February 23, 1947, was in her custody and control; that one Melva Smith was appointed executrix of his last will and testament; that the defendant, as the mother of the minor child, entirely provided for and cared for him at her own expense and that she made repeated attempts to collect from the deceased the support as provided for in the judgment; that she placed the collection of the same in the hands of her attorney; that at the time she believed that the deceased judgment debtor had no funds from which an execution could be satisfied and no means of paying the judgment except from his earnings, which were intermittent, and that said judgment could not be satisfied; that her attorney advised her to take the matter up with the district attorney and law-enforcement officers and that in 1928 she filed a complaint for non-support of the minor child in Riverside County, which was subsequently dismissed on condition that he support the child; that she thereafter, in 1931, filed another complaint against him and was informed that defendant in that case could not be located and learned that on January 21, 1935, a warrant of arrest was returned to the court on the ground that the officers were unable to locate the defendant; that during the five-year period following the date of the judgment she was unable to gain any knowledge of any property from which an execution could be satisfied either in whole or in part; that the deceased, the judgment debtor, left the State of California in order to avoid said debt and in order to avoid making payments for the support of his minor child; that she believed that he went to Mexico about the time of the issuance of the criminal complaint and remained there for a period of time in excess of ten years; that she learned that he, on three or four occasions, was in and out of California, and did not learn that he had returned or that he had property located in this state until recently; that she was informed that nothing could be done about the support of the minor child or the enforcement of the judgment as long as the judgment debtor remained outside of the State of California; that she believed that because of the lapse of time between the rendering of the judgment and the time she finally learned the judgment debtor had returned to California that the judgment could not be collected and that she had no right to it due to the then age of the minor child; and that she did not learn of her rights until she consulted her present attorney.

Melva Smith alleged that she was the qualified and acting executrix of the estate of Robert F. Pemberton, deceased; claimed that the maximum amount of the deceased's estate was about $6,000; that several thousand dollars of other claims had been filed in said estate; that she knew the decedent from April, 1931, until July 24, 1948; that she was a partner and business associate with him in Los Angeles in the garage business; that in 1945, the deceased sold the business and moved to Vista and that he remained there continuously from 1945 until his death; that from April, 1931, until 1945, deceased resided continuously in Los Angeles; that during that interval the minor son visited with his father, having been sent there by the mother; that the mother had knowledge of and knew of his whereabouts and of his business; that the deceased never left the State of California to avoid this claimed debt or for any other reason, and never remained in Mexico for any great period of time but that in 1931 he did take a vacation for a period of two months. She denied that any sum was due under the order; denied that defendant made repeated attempts or any attempts to collect the amount; and that if she had used due diligence her claim and judgment would have been paid; that the father, on numerous occasions, and whenever the son called it to his attention, bought clothes and necessities for the child, gave him money, bought him an automobile, and treated his son as a father should; and that in his will he left him $500; that if the claim of the defendant is allowed the bequest to the son will abate and the estate will be distributed as an insolvent estate; that Robert F. Pemberton, for seven years prior to 1930, was an employee working for a canning company at Buena Park as a fruit buyer; that defendant remarried twice after defendant's divorce from the deceased; that she searched all documents which came into her possession as executrix of the estate of Mr. Pemberton and found four checks, all signed by the deceased, drawn on separate bank accounts, indicating that a check for $20.00, dated January 17, 1942, was endorsed "Dora Lee", the defendant; that another one for $25.00, dated February 18, 1942, was similarly endorsed; that another one dated June 20, 1942, for $20.00 was endorsed by her and Robert Pemberton; that she found in a check-stub book for the year 1941, checks written to Dora Lee, totaling $130; that she knew of her own knowledge that in 1934 the minor son spent a number of days with his father in Long Beach, at which time he was selling real estate in Los Angeles; that in 1935 and 1936, he had other employment there, and that it was there that she and the deceased opened the Witmer Street Garage.

Defendant's attorney filed an affidavit in which he states that through investigation he found that Robert F. Pemberton was the owner of two pieces of property located in San Diego County; that the title was vested, as a matter of record, in Robert F. Pemberton and Melva Smith Pemberton, husband and wife, as joint tenants; that it does not appear that Melva Smith ever was the wife of the deceased; that in the will offered for probate, dated August 14, 1945, Melva Smith is referred to as "Melva Smith", and the will declares that "* * * I am not married" and that "I have one child, Robert Anthony Pemberton"; that he believed that the property in San Diego County was of the reasonable value of $60,000, and was the property of the deceased and was thus held in joint tenancy for the purpose of defrauding the creditor, Dora Landreth (the defendant). Dora Landreth, in reply, states that she at no time knew the whereabouts or address of her former husband until a few months prior to his death; that she had given the law-enforcement officers of Riverside all the information she had as to his whereabouts but that they reported they were unable to locate him; that she was without funds to take other steps than she did to enforce the judgment; that about $250 were given by the father *to the child* at various times since 1941, and that she never learned, until recently, that he had property; that the monies or checks were sent directly to the child and used directly by him; that she did not recall endorsing any checks for him; and that she received no money in satisfaction of the judgment.

The minor son's affidavit shows that in 1934 he visited his grandmother at Long Beach and that he saw his father at her house on one or two occasions, but did not know where he was living or of his whereabouts; that during 1941 or 1942, the grandmother arranged for him to see his father, who sent him a few checks, but that his father said: "I am giving this money to you and not to your mother"; that the money was received by him personally and was spent for his own individual wants as a high school boy; that he learned years later that his father was living at Vista; that he visited him there and saw the property, and shortly before his death his father told him that he had been offered $60,000 for one piece of property consisting of about 12 acres, improved with two sets of buildings and planted to avocados and citrus trees, and showed him another piece of property likewise planted, consisting of 10 or 12 acres, which he said he owned; that his mother did not discuss with him matters concerning his father until the last two years; that they ignored all discussions about his father and that he did not tell her what little he knew about him.

Dora Landreth then filed a counter-affidavit stating that she located, among some old papers, a postal card signed by her former husband and addressed in his handwriting, which was received through the mail in 1932, and it was written in Spanish. Interpreted, it reads as follows: "Dear Dora: I am sorry that I did not write you any sooner than I wanted to; as you may know I was killed in an airplane accident, but as you see there was nothing to it only a slight incident and as you may know I am safe and sound. When I arrive in Mexico, the Capital, I will write to you and explain everything and more that I may have to tell you. With all my sincere love I close, love to my boy. (Signed) Your Bob Pemberton." The post-mark shows: "Ensenada, B. Cfa. 7 Jan. 32." She further relates that on each of the occasions when she made an attempt to collect the judgment and order, the deceased plaintiff told her and represented to the court and other parties who were attempting to enforce collection, that the deceased was without funds with which to comply with said order to support the minor child and that she believed this all during the period of five years following the date of the order.

Melva Smith then filed a counter-affidavit in which she states that from 1932 until 1948, Robert F. Pemberton owned various and sundry automobiles registered in his name with the Department of Motor Vehicles of the State of California; that between those dates he was the record owner of and had an interest in a lot in San Clemente acquired about the year 1936, a small farm located at Artesia, acquired in 1940, the Colwit Courts in Los Angeles, acquired in 1938, and a house and lot at Newport Beach, acquired that year, and that the property located at Vista was purchased by affiant and deceased in 1945; that the son was in the military service for a period of time unknown to affiant.

Counsel for the executrix move to strike great portions of the affidavit of Dora Landreth on the ground that they were incompetent, irrelevant and immaterial, and for the reason that they were conclusions and had no evidentiary support or value. This motion was denied. Objection was made to this ruling.

After hearing, the trial court in the divorce action found that the defendant had used due diligence in attempting to enforce the judgment and that from the affidavits it appeared that there were sufficient reasons for failing to secure an execution under section 681 of the Code of Civil Procedure and that the judgment remained unsatisfied in toto. The court ordered that the judgment be enforced by execution, including the filing of a claim against the estate of the deceased plaintiff. From this order the executrix appeals.

The first point is that the denial of the motion to strike was error because all of the allegations in defendant's affidavits were based on information and belief and hearsay and should have been stricken, and were not proof of the facts stated therein, citing Kellett v. Kellett, 2 Cal.2d 45, 48, 39 P.2d 203; and Pratt v. Robert S. Odell & Co., 63 Cal.App.2d 78, 146 P.2d 504; that without said hearsay statements insufficient facts remain to warrant the granting of the motion.

[1] While there were certain portions of the statements in the affidavits which might well have been stricken on the theory that they were conclusions, there were sufficient proper allegations remaining to justify the consideration of their merits.

The next point is that there was no due or reasonable diligence disclosed by any portion of these affidavits and that the defendant affirmatively shows thereby that she did nothing for more than 19 years to collect her claimed judgment except to file a criminal complaint for nonsupport, and that when opposed by the affidavits filed by appellant and her uncontradicted averments, even the slightest diligence was not shown, citing Butcher v. Brouwer, 21 Cal.2d 354, 358, 132 P.2d 205; and Hatch v. Calkins, 21 Cal.2d 364, 132 P.2d 210.

Sec. 685 of the Code of Civil Procedure provides that: "In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion."

[2-4] Under this statute the court may grant a judgment creditor leave to enforce his judgment by presenting the claim against the debtor's estate, and by bringing an action thereon if the claim is rejected. Saunders v. Simms, 183 Cal. 167, 190 P. 806; Pacific Gas & Electric Company v. Elks Duck Club, 39 Cal.App.2d 562, 103 P.2d 1030. But such an order is subject to the same rules applicable to one which authorizes the issuance of execution more than five years after judgment was entered. It may only be made if, during the five years following entry of judgment, the execution creditor exercise due diligence in locating and levying upon property owned by the debtor, or in following available information to the point where a reasonable person would conclude that there was no property subject to levy within that time. Lohman v. Lohman, 29 Cal.2d 144, 173 P.2d 657.

[5] In Butcher v. Brouwer, 21 Cal.2d 354, 357, 132 P.2d 205, the effect of the 1933 amendment to sec. 685 of the Code of Civil Procedure, Stats.1933, p. 2499, is fully discussed. In effect, it was there held that the object of the new amendment was to place upon a creditor seeking to enforce a judgment more than five years after its entry, the burden of showing why he was not able to satisfy his claim within the statutory period during which he is entitled to an execution as a matter of right.

[6] In the Lohman case the majority court held that a creditor is entitled to an execution as a matter of right for all *installments* accruing *within five years* from the date of the application therefor. Accordingly, defendant was entitled to execution and to file a claim against decedent's estate for the five years' accumulation due from decedent immediately preceding the application of defendant to enforce the judgment in her favor. See, also, Atkinson v. Atkinson, 35 Cal.App.2d 705, 96 P.

2d 824; Taylor v. George, 34 Cal.2d 552, 212 P.2d 505.

As to the remaining portion of the judgment the competent evidence produced by the affidavits mentioned must be analyzed in the light of the rule stated in Butcher v. Brouwer, supra, to determine whether the defendant met the burden of proof there imposed upon her.

In Shields v. Shields, 55 Cal.App.2d 579, 130 P.2d 982, an order authorizing the issuance of an execution after five years was sustained upon a showing that the wife had the husband, the judgment debtor, arrested on three separate occasions during the five-year period, for failure to provide for the minor child but with the additional showing that an execution was issued during that period and was returned unsatisfied, and there was the additional showing that the defendant had written her explaining that his "remissness" was due to his financial incapacity.

In McClelland v. Shaw, 23 Cal.App.2d 107, 72 P.2d 225, this court held that the mere fact that the defendant had an equity in property that was greatly incumbered did not deprive plaintiff of his right to enforce his judgment after the lapse of five years, and the fact that the defendant had property during that period out of which the judgment might have been satisfied furnished no ground for the refusal to order the issuance of the execution, citing Demens v. Huene, 89 Cal.App. 748, 265 P. 389, in which case it was alleged that during the five-year period the judgment debtors were engaged in conducting rooming houses for many years; that they owned and possessed ample personal property, such as furniture and leases; that for three years they possessed an automobile worth the amount of the judgment, which could have been sold to satisfy the judgment through execution, but that no effort was made to levy upon them and that plaintiff knew of these facts. It was there held that under the facts of that case the granting of the order sought was a discretionary matter and that no abuse of discretion appeared.

In Lohman v. Lohman, supra [29 Cal.2d 144, 173 P.2d 661], the majority court sustained an order, which in part denied the issuance of an execution to enforce a judgment for alimony beyond the five-year period because of insufficient showing. The opposition to the motion was based upon the delay in enforcing the provisions of the judgment notwithstanding the creditor's knowledge that her former husband "was engaged in business in the County of Los Angeles and was solvent." It was shown that the husband, during the period in question, wrote his former wife seeking her "indulgence" in her endeavor to collect the sums due at that time. In effect, it was held that the showing was insufficient to warrant an order for the issuance of the execution for the period in question. However, in Butcher v. Brouwer, supra, it was held that there was sufficient showing for such an order where two executions were issued within the five-year period and were not enforced because of an order of court and where, before the issuance of a third execution, the debtor had transferred his property and where the next property acquired by him was so heavily incumbered that nothing could be realized on it by levy of execution.

[7] It must be conceded that the trial court might well have determined that there was sufficient showing made justifying it in denying the application for the order as to the part now under consideration. That, however, is not the question before us. Our question is whether there is any sufficient showing of due diligence on the part of the defendant which might reasonably justify the order and preclude us from saying the trial court abused its discretion.

[8] The order for support was made in 1928. There is no showing that the father made any payments as required. According to defendant's showing, during that year defendant caused a complaint to be filed for nonsupport of the child, which was subsequently dismissed, upon his promise to support the child. The mother was compelled to support it during its minority. She was constantly told by the father that he had no funds. She sought advice of her attorney again in 1931, in another endeavor to collect support for the child, and a warrant was issued and the plaintiff was not located. It was a few months thereafter

that she heard from him in Mexico, indicating that he was proceeding farther into Mexico, and she had the right to believe that he was avoiding all processes of the court. There is no showing that any real property was acquired by him until 1936, eight years after the date of the order, when he and Melva Smith entered into a partnership in the garage business in Los Angeles, and there is no allegation that the properties mentioned in her affidavit or the automobiles owned by him, were free and clear of incumbrances or were subject to execution and sale, or that the equities were sufficient to satisfy defendant's judgment. There is rather convincing evidence, notwithstanding defendant's affidavit to the contrary, that she did know that her former husband was living in Los Angeles in 1942, because there are canceled checks in evidence made payable to her and drawn on different bank accounts. They were endorsed by her and the checks show Mr. Pemberton's business address. However, this fact, in and of itself, may not have been sufficient to justify the denial of the issuance of the order.

In Long v. Long, 76 Cal.App.2d 716, 173 P.2d 840, it was held that the doctrine of laches could not be invoked by a divorced husband to defeat his former wife's motion for issuance of execution to enforce a judgment for alimony where, notwithstanding the fact that his affidavit disclosed ownership of property of great value, he had systematically avoided payment of his obligation for 14 years, during which time the wife was without means to search for him, and where he had absented himself from the state to avoid the consequences of his disobedience of the court's order directing payment of his debt. See, also, Troendle v. Clinch, 74 Cal.App.2d 480, 169 P.2d 55.

In Saunders v. Simms, 183 Cal. 167, at page 171, 190 P. 806, it is said that since the original judgment of the court directed the payment of money to the mother to assist her in the support of the child placed in her custody, and she having furnished such support from her own resources, she is clearly entitled to recover in this proceeding in her own name and for her own reimbursement.

While the question of the sufficiency of the showing is a close one, we are not prepared to hold that the trial court abused its discretion in granting the order to issue the execution.

[9, 10] The next complaint is that no credit is allowed for sums admittedly paid defendant by her former husband. There seems to be some merit to this contention. The checks made payable to defendant in 1942, were endorsed by her. They totaled approximately $275. Some bear the additional endorsement of the son. It is defendant's answer that she never received this money but it was paid over to the son for his personal benefit under the direction of the former husband and was not to apply on any judgment obtained by her. Apparently, the trial court believed her and disallowed these items. Under the well-known rule we cannot disturb this finding. McClelland v. Shaw, 23 Cal.App.2d 107, 72 P.2d 225; Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301.

Order affirmed.

MUSSELL, J., concurs.

95 Cal.App.2d 511

In re BRADY'S ESTATE.

COBBY v. ADAMS et al.

Civ. 14212.

District Court of Appeal, First District,
Division 2, California.

Jan. 10, 1950.

Rehearing Denied Feb. 9, 1950.

Hearing Denied March 6, 1950.

Proceeding in the matter of the estate of Edward R. Brady, deceased, wherein Emma L. Cobby petitioned to admit to probate in alleged will of deceased opposed by Russell B. Adams and another.

From a decree of the Superior Court for the County of San Francisco, T. I. Fitzpatrick, J., denying admission of alleged will through probate the petitioner appealed.

The District Court of Appeal, Nourse, P. J., affirmed the judgment holding that the alleged will was not clearly and distinctly established.

1. Appeal and error ⚷803

Where appeal was dismissed by the Supreme Court because it has been taken from a nonappealable order dismissal left case with Superior Court on remittitur just as it stood on date the attempted appeal was taken and Superior Court had full jurisdiction and could at any time make findings and enter judgment.

2. Appeal and error ⚷882(17)

Complaint of appellant that too much time elapsed between hearing of evidence and entry of findings was without merit where delay was caused solely by appellant's unauthorized appeal. Code Civ.Proc. § 632.

3. Trial ⚷377(2)

On application to reopen a case to produce additional evidence application must be supported by affidavit or other evidence justifying failure to offer the evidence during trial.

4. Wills ⚷386

In proceeding to prove an alleged will, determination of credibility of witnesses and conflicts in the testimony were for the trial court whose determination was conclusive on appeal. Probate Code, § 350.

5. Wills ⚷302(1)

Evidence was not sufficiently clear and distinct to establish existence of will at time of death of deceased so as to justify its admission into probate. Probate Code, § 350.

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Joseph A. Brown, San Francisco, for appellant.

George M. Naus, San Francisco, for respondents.

NOURSE, Presiding Justice.

This cause was before us on a prior appeal. In re Estate of Brady, Cal.App., 188 P.2d 531. Following a transfer to the Supreme Court it was discovered that the appeal had been taken from a nonappealable order and the appeal was dismissed. On the return of the remittitur to the superior court, proposed findings were prepared by counsel for respondent and served on appellant. Thereafter the parties appeared before the judge of the superior court for the settlement and signing of the proposed findings, and the proposed order refusing probate of will. Prior thereto counsel for appellant filed an unverified objection to the proposed findings and order stating that "we now desire to introduce further and additional evidence and object to the making of an order until there has been a further hearing and the introduction of evidence." No further indication was made either in writing or orally as to what additional evidence appellant desired to produce, no reason was given why such evidence was not offered during the earlier stages of the trial, and no offer of proof of additional facts was made.

Upon the conclusion of this hearing the trial court entered the following findings and order:

"Findings

"1. The alleged will sought by said petitioner to be admitted to probate was not in existence at the time of the death of said Edward R. Brady, deceased.

"2. Said petitioner has not proved the provisions of any will, either clearly, distinctly, or at all, by two credible witnesses, or at all.

"The Court concludes that the probate prayed by petitioner should be refused.

"Order

"It is ordered, that the probate of will prayed by petitioner Emma L. Cobby be, and it hereby is, refused, and that appointment of an administrator with the will annexed be, and it hereby is refused.

"Dated February 18th, 1949."

It should be noted that appellant had from October 6, 1948, to February 18, 1949, to perfect the request to take additional evidence or to make other objections to the manner of proceeding.

[1, 2] Before considering the appeal on the merits it is well to consider the matter

of procedure. The dismissal of the former appeal left the case with the superior court just as it stood on the date the abortive appeal was taken. All during the pendency of that appeal the superior court had full jurisdiction of the cause and could have at any time made the findings and entered judgment. Brady v. Burke, 90 Cal. 1, 4, 27 P. 52; People v. Adamson, 33 Cal.2d 286, 201 P.2d 537. The cause was at all times open, just like a cause which has been tried and submitted for decision. If we understand appellant's complaint to be that too much time elapsed between the hearing of evidence and the entry of findings, it must be apparent that such delay was caused solely by appellant's unauthorized appeal. She may not therefore complain that the findings were not made within the time designoted in the statute. C.C.P. sec. 632.

Appellant states that it is unnecessary to discuss the question whether there should have been a trial de novo. She also states that any additional evidence which the parties desired to present should have been received. We do not agree with either statement. If a trial de novo was necessary the order must be reversed. Since the point is not urged we refrain from deciding it.

[3] As to the right to reopen a case to produce additional evidence the law is clear. The application must be supported by affidavit or other evidence justifying the failure to offer the evidence during the trial. 24 Cal.Jur. 771.

The real issue on this appeal is whether the evidence supports the finding that petitioner failed to prove the existence, or the provisions of any will "clearly and distinctly * * * by at least two credible witnesses" as required by section 350 of the Probate Code.

Edward R. Brady died in San Francisco in February, 1933. His wife had predeceased him but he left a son, Edward T. Brady, and a stepson, Russell B. Adams. The latter and one Biggins, a trusted employee of deceased, were appointed administrators on a showing of intestacy. Final distribution and discharge were had in 1934, and the estate was closed in that year. The petition under review was filed twelve years after distribution.

Petitioner, Emma L. Cobby, is a sister of deceased. Her first petition, filed on January 25, 1946, independently under No. 101,995, alleges in part that Russell Adams on or about February 11, 1933, came into possession of the last will and testament of deceased, that petitioner and three others were beneficiaries under that will and that Adams suppressed the will; with prayer that he be required to produce that will, that it be admitted to probate and petitioner be appointed administratrix. Adams demurred. No disposition of this demurrer is on record. Shortly after this on February 13, 1946, petitioner filed a new petition in the old probate proceedings with the same allegations and prayer as in the former petition adding that the substance of the will is that it gives to petitioner and the sister Loretta Ellen Brady each $100 per month for life and to the sister Mary L. Hyde $150 per month for life, the residue to the son Edward T. Brady.

The evidence in substance was as follows: A Miss Kerrigan testified that for nineteen and one-half years she had been secretary of the corporation Eureka Boiler Works, or which concern deceased was superintendent. She went over many wills, maybe eight or ten, with deceased which he had written in pencil, usually on yellow lined note paper. Some of them were dated but they were not signed. They were all in his handwriting. His signature was at the beginning of them. "I, Edward R. Brady." His three sisters were always remembered. When Mr. Brady died all papers and money were turned over to Mr William Metson, who was attorney for the Eureka Boiler Works and attorney for the estate. The morning of the death three or four, and in the following months at least four more, of these unsigned wills were found and turned over to Mr. Metson. Deceased wrote such wills from 1925 to 1933. Some he tore up. Some of these unsigned wills were in the books of the boiler works in which Mr. Brady figured jobs, in different books he worked on, or "they cropped up at different places." There were twelve on lined yellow tablet sheets.

They were not dated. Later Mr. Biggins found a signed will in the upper office and brought it down to witness. That was around July or August, 1933. It was on yellow paper; it was dated with month, day and year. It was dated 1916. *It was one sheet* dated at top and signed at bottom. They showed it to the witness DeRosa. The following morning they turned it over to Mr. Adams. Mr. Adams said he would take it to Mr. Metson. *Mrs. Gertrude Brady* (wife of deceased) was the *heir to that will,* and his three sisters were in the will. She did not copy it but remembers it. Ralph Myers was appointed executor in it. Deceased's wife was to be his sole heir. *He did not mention his son nor Russell Adams in it.* The three sisters were left different monthly amounts, $50 and $75. The witness turned in her resignation to Mr. Adams in 1936 because Biggins who had been with the firm for forty years was made to leave. Mr. Biggins died three years before the trial. When she heard that Loretta Hyde, a niece of petitioner, was sick and needed help, she asked. "Why don't they go after Russell Adams and Eddy Brady," and told that deceased left a will. That was in 1937. At that time Mr. Metson gave her various papers regarding the estate, some thirty or thirty-five, which she later gave to petitioner. Among them was one of the unsigned wills that was not dated; it set up a trust fund.

Comment on this testimony. If Mrs. Gertrude Brady "was to be his sole heir" and the son was not mentioned, the death of the wife prior to the death of the testator would leave the son as the sole heir under section 90 of the Probate Code unless the provisions of section 91 obtain, an exception which must be proved by competent proof. If the three sisters were left monthly payments of fifty or seventy-five dollars each the witness must have been testifying about one of the other unsigned wills which she had read.

Lawrence A. DeRosa, certified accountant who used to audit the books of Eureka Boiler Works, was shown a document on yellow paper by Miss Kerrigan and Mr. Biggins. It was dated May or June, 1916, with a date he does not remember. It had a date at the top and deceased's signature at bottom. It was all written in deceased's handwriting. *He saw two sheets of it,* the first initialed, the second signed; the second was only half full; the top of both sheets were dated. He glanced through it; read about one-fourth. It said *deceased's sisters and his son and stepson* should be his heirs, the estate to be divided, as shown below. He does not remember that deceased's wife was mentioned although she died many years later, but there were two or three more involved in it of which *the wife might have been one. He knows that the son and stepson were in.* In 1940 Mr. Metson told him he had never received it from Mr. Adams, nothing but the original papers turned over. Comment on this testimony. The witness said too much. When shown the paper found in 1933 he "just glanced at it." Thirteen years later he testified, giving a detailed account of the provisions of the alleged will including the names of all the devisees, the amounts left to each and the terms and conditions of a complicated testamentary trust. He was positive that Mrs. Cobby was one of the devisees. But there was no Mrs. Cobby when the will was alleged to have been executed. Deceased's sister, Mrs. French, became Mrs. Cobby ten years later in 1926. He thought there were eight or nine heirs but couldn't say whether the will mentioned the wife. He was just as positive that the will consisted of two pages as the former witness was that it consisted of one page.

It should be observed that it would have been almost impossible for any man to write in one page or two a will containing all the trust provisions which these two witnesses outlined, and which are alleged in the petition, and which form the sole base upon which appellants now seek to support the allegations of a continuing trusteeship.

Russell B. Adams, a stepson, testified that shortly after the death of Brady, M.. Biggins and Miss Kerrigan informed him that they had found a will and handed a paper to him. He told them he would take it to Mr. Metson. It was written in the form of a will in deceased's handwriting on a yellow piece of paper. It had no date according to his recollection. It was written in pencil; it named some sisters and gave them, he thinks, the same proportion as in certain notes written by deceased. The *son of deceased was principal beneficiary.* Adams himself was given $150 a month. It did not name an executor. He gave it to Mr. Metson one hour after he received it.

Esther H. Orr, secretary of Mr. William Metson at the time of the administration of the Brady estate, had all of the Brady papers except a few that were in the safe. There were numerous unsigned drafts. *None was signed.* She does not remember whether any was dated. Edward T. Brady, son of deceased, was the only heir at law. She never heard of a signed will of deceased.

On April 4, 1946, the trial court made an order in the old estate matter, No. 63,691, ordering that attorneys of both parties should have access to the papers left by Mr. Metson and then under control of Mrs. Jafet Lindberg and P. H. McCarthy, attorney. On July 1, 1946, the attorneys declared that the search had uncovered nothing and submitted the matter.

On this evidence the trial court was asked to determine whether the provisions of the alleged will were "clearly and distinctly proved by at least two credible witnesses." On this issue the trier of facts had this conflicting situation: One witness testified that the supposed will was in one sheet; another testified it was in two; one witness testified that the wife was "his sole heir" and that the son and Adams were not mentioned; another witness testified that the son and step-son (Adams) were made the heirs with the sisters of deceased, but did not recall that the wife was mentioned in it. Another witness testified that the document referred to by these witnesses was by him handed to Mr. Metson, that it bore no date, that it made the son the principal heir and gave Adams $150 a month. This witness did not testify that the document was signed by deceased. This evidence is not of the type which would justify a reviewing court in setting aside the finding. The only witnesses who testified that they saw a *signed* will contradicted each other on so many essential points that they appear to have been speaking about two different documents.

[4, 5] We see no error in the trial court's finding. Appellant's witnesses were not only discredited by their own testimony, but by their obvious interest in the outcome of the proceeding and the hopeless conflict in their recital of the "provisions" of the will. It was for the trial court to determine the credibility of the witnesses and to resolve those conflicts. Such determination is conclusive on appeal. Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868; Hicks v. Reis, 21 Cal.2d 654, 659, 134 P.2d 788; In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. It would serve no useful purpose for this court to discuss appellant's criticism of the rule of these cases in the light of authorities from other jurisdictions, or to attempt to reconcile the seeming confusion of thought noted particularly in Re Estate of Bristol, supra. It is sufficient for this court to say that the rule of decision in this state now is that when a finding is supported by some substantial and credible evidence it is binding upon the reviewing court.

Judgment affirmed.

DOOLING, J., concurs.

95 Cal.App.2d 533

W. I. HOLLINGSWORTH & CO. v. GALLEN et al.

Civ. 17100.

District Court of Appeal, Second District,
Division 1, California.
Jan. 11, 1950.

As Modified on Denial of Rehearing
Feb. 6, 1950.

Hearing Denied March 6, 1950.

W. I. Hollingsworth and Company sued Henry O. Gallen and others to recover a real estate broker's commission.

The Superior Court for Los Angeles County, Thomas J. Cunningham, J., rendered a judgment of nonsuit, and plaintiff appealed.

The District Court of Appeal, Doran, J., affirmed the judgment, and held that plaintiff had not produced a purchaser ready, able and willing to purchase the property as it actually existed.

1. Brokers ⚿54

Commissions are due a broker who procures a purchaser who is ready, willing and able to take realty on terms prescribed.

2. Brokers ⚿54

Where broker was given option to purchase realty consisting of approximately 155,000 square feet at stated price for resale to named purchaser, and was to receive stated commission on gross sale price, and purchaser made initial deposit, but stated dimensions which made an actual area of 30,000 square feet less than that initially contemplated, and thereafter demanded return of deposit because of area shortage, broker produced no purchaser ready, willing and able to purchase and was not entitled to commission.

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Walker, Meyers, Ingram & Moser, Los Angeles, and Sydney S. Finston, Los Angeles, for appellant.

Bauder, Gilbert, Thompson, Kelly & Veatch, W. I. Gilbert, Jr., Los Angeles, for respondents.

DORAN, Justice.

The action herein was instituted by appellant to recover the sum of $8,575.00 as a real estate broker's commission based upon a written contract of employment by the respondents. The respondent Gallen, record owner of the property in question, on January 12, 1945, gave to the respondents Bulask and Cole, a real estate brokerage firm, an option to purchase said property. In October or November, 1946, Cole met with a Mr. Kurlander, an employee of plaintiff-appellant, for the purpose of discussing sale of the property by appellant. This meeting resulted in a letter signed by Bulask and Cole giving to the Hollingsworth Company "an option to purchase the southwest corner of Olympic Boulevard and Bundy Drive, consisting of approximately 155,000 square feet", at a price of $175,000.00. The appellant company was to "receive commission on the gross sale price of 5%", and the option was "only for the sale of said property to W. & J. Sloane Company, or nominee, who will lease and/or erect building for W. & J. Sloane Company as tenants". By another letter, this option which by its terms expired on December 5, was extended to December 15, 1946.

On December 14, 1946 a "Standard Form Deposit Receipt" was executed by "W. I. Hollingsworth & Co. (Broker) by John J. Kurlander", acknowledging receipt from W. & J. Sloane of "$15,000.00 deposited as initial payment on the purchase of * * * Southwest corner of Olympic and Bundy. 588 feet running West of Bundy on Olympic. 260 feet running south on Bundy from Olympic; by approximately 588 feet running west from Bundy along railroad right-of-way; by 271 feet on west side of property." The full price stipulated was $171,500; the buyer W. & J. Sloane by Myles E. Andrews, Vice President, signed in acceptance under the printed words "I agree to purchase said property on above terms". The owner, Henry O. Gallen together with Cole and Bulask, signed the following statement printed at the foot of the receipt: "I * * * hereby agree to sell said property on above terms and conditions and agree to pay a commission of $8,575.00 to the above named Broker, or one-half the deposit in the event same is forfeited by the purchaser, provided that same shall not exceed the full amount of the commission".

It appears from the record that in place of the dimensions recited in the deposit receipt quoted above, the actual dimensions of the property were 577.83 by 245.07 by 566.63 by 266.56 feet, making the actual area about 30,000 square feet less than the computed area. "Within two weeks after said contract * * *", according to appellant's brief, "the purchaser demanded of plaintiff-appellant (broker) the return of the $15,000 so deposited" on account of the area shortage, and "The plaintiff-appellant thereupon returned the $15,000 deposit and the contract of purchase was never thereafter consumated". The respondents refused to pay appellant anything at all as a commission or otherwise and the present action resulted. The trial court granted a non-suit at the close of plaintiff's case.

Appellant's brief presents the basic contention that "The trial court erred in granting a motion of non-suit in that plaintiff-appellant had successfully proven a prima facie case for recovery of a brokerage commission * * * by having proved the existence of an employment contract, * * * the terms thereof, * * * all necessary performance on the part of plaintiff-appellant, * * * a breach on the part of defendants-respondents, and * * * damages". Appellant insists that "The lower court fused the employment contract with the purchase and sale agreement to such an extent as to superimpose upon the employment contract conditions which were foreign to it and which were properly part of the purchase and sale agreement only". Briefly, it is claimed that "return of the $15,000 deposit upon demand of the purchaser * * * had nothing whatever to do with plaintiff-appellant's prima facie case for recovery of commissions".

The respondents answer these contentions by averring that "The plaintiff * * * showed affirmatively that he had not performed the obligations under the contract of employment"; that "Through a mistake in the description of the property the plaintiff negotiated an invalid contract of sale"; that "The plaintiff recognized the invalidity * * * rescinded the contract so far as it was able and took a position adverse to the defendants, as sellers, by returning the deposit"; that "The defendants secured no benefit as a result of any services rendered by the plaintiff"; and that the non-suit was properly granted because the plaintiff failed to make out a prima facie case to recover".

Appellant's contentions cannot be sustained. Under the evidence disclosed by the record, it cannot be said that the trial court's granting of a non-suit constitutes reversible error. Rather, as respondents aver, the appellant's evidence merely "shows that it negotiated a contract unenforceable between purchaser and seller because of a mistake in the description". The only contract negotiated was one which attempted to sell to W. & J. Sloane real estate of a description different from and smaller than that which the latter proposed to buy. The general effect of the appellant's activity was therefore no better, so far as the seller was concerned, than a situation in which the broker had been unable to find any purchaser. Indeed, no purchaser was produced "ready, willing and able" to buy the property as it actually existed. That this situation was recognized by appellant broker is, of course, evidenced by appellant's return of the $15,000 deposit. The respondents secured no possible benefit as a result of any services rendered by appellant.

[1, 2] No cases have been cited in support of appellant's position wherein the factual situation is sufficiently similar to that here existing. Stewart v. Bowie, 43 Cal.App. 751, 185 P. 868, 869, relied upon by appellant, merely affirms the rule that commissions are due a broker who procures "a purchaser who is ready, willing, and able to take the property on the terms prescribed," and decides that in such a case "the broker cannot be deprived of the agreed compensation because deferred payments are not made by the purchaser, or other terms of the contract not carried out". But, as already pointed out, the appellant broker, by its own showing, never did produce such a prospective purchaser ready to take the particular property as it actually existed. Without in any manner attempting to decide whether the broker rightfully or wrongfully returned the purchaser's deposit, the record fails to show that the plaintiff made out a prima facie case on the question of an earned compensation.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; CARTER and SPENCE, JJ., dissenting.

95 Cal.App.2d Supp. 924

SALOMONS et al. v. LUMSDEN et al.

Civ. A. 7177.

Superior Court, Appellate Department
Los Angeles County, California.
Dec. 20, 1949.

Action by Faith Salomons and others against Florence C. Lumsden and others, to recover money paid by plaintiffs under contract for purchase of realty.

The Municipal Court of the City of Los Angeles, Joseph Marchetti, J., granted defendant's motion for nonsuit and declared it would operate as an adjudication on the merits, and plaintiffs appealed.

The Appellate Department of the Superior Court, Shaw, P. J., held that evidence that one of defendants made an erroneous positive statement of fact as to area of realty plaintiffs agreed to buy, and that plaintiffs promptly rescinded agreement upon discovering statement was erroneous, was for jury, and reversed the judgment.

1. Trial 🔑139(1)

A motion for nonsuit will not be granted where evidence is sufficiently substantial to support a finding for plaintiff. Code Civ. Proc. §§ 581, 581c.

2. Trial 🔑165

On a motion for nonsuit, evidence will be viewed most favorably to plaintiff with every legitimate inference drawn in plaintiff's favor. Code Civ. Proc. §§ 581, 581c.

3. Trial 🔑159

"Nonsuit" is a judgment given against plaintiff when he is unable to prove his case, or when he refuses or neglects to proceed to the trial of a cause after it has been put at issue, without determining such issue, although the term "nonsuit" is sometimes broadly applied to a variety of terminations of an action which do not adjudicate the issues on the merits. Code Civ. Proc. §§ 581, 581c.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Nonsuit".

4. Trial 🔑159

Where plaintiff's proof is not sufficient to support a judgment in his favor, courts will grant defendant a nonsuit and take a case from the jury. Code Civ. Proc. §§ 581, 581c.

5. Trial 🔑139(1)

If plaintiff's evidence is insufficient in law to support a verdict for plaintiff, or court would set aside such a verdict as contrary to evidence, court has duty to nonsuit plaintiff. Code Civ. Proc. §§ 581, 581c.

6. Trial 🔑109

A nonsuit on plaintiff's opening statement, when complete, may be granted, although better practice is to wait until the testimony is complete. Code Civ. Proc. §§ 581, 581c.

7. Trial 🔑109, 159

Where statute placed section providing that defendant could move for nonsuit after plaintiff completed his opening statement or presentation of his evidence, without defendant's waiving his right to offer evidence in event motion is not granted, in the code as a new section, and removed all reference to nonsuit from another section of code, legislature intended to continue use of nonsuit procedure. Code Civ. Proc. §§ 581, 581c.

8. Judgment 🔑570(5)

Where statute added provision to existing code that a judgment of nonsuit unless otherwise ordered operates as an adjudication upon the merits, former rule as to effect of a nonsuit was changed, and a nonsuit would bar a subsequent suit on same cause of action or an adjudication of any of issues. Code Civ. Proc. §§ 581, 581c.

9. Vendor and purchaser 🔑341(4)

In action by purchasers to recover money paid after rescission of contract for purchase of realty on ground of fraudulent misrepresentations, where evidence that one of vendors at time of purchase made erroneous statement of fact as to dimensions of realty upon which purchasers relied, and that purchasers promptly rescinded agreement, tended to prove purchaser's cause of action, nonsuit of purchasers on merits was error. Code Civ. Proc. §§ 581, 581c.

10. Vendor and purchaser ⚷34

The owner of land is presumed to know its boundaries and area, and a buyer is justified in relying upon his representations in regard to such facts.

11. Vendor and purchaser ⚷334(2)

In action by purchasers to recover money paid after rescission of contract for purchase of realty on ground of fraudulent misrepresentations by vendors, fact that purchasers saw listing agreement which correctly stated size of lot did not prevent them from relying upon positive statement by one of vendors that listing was wrong.

12. Vendor and purchaser ⚷341(3)

In action by purchasers to recover money paid after rescission of contract for purchase of realty on ground of fraudulent misrepresentations by one of vendors, purchaser was not bound to prove vendor's knowledge that his statement of the size of the lot was untrue.

13. Fraud ⚷13(3)

Where a party makes an incorrect statement upon which another party relies, lack of knowledge on the subject by party making statement may be assumed, but it will be inferred that he made his statement in a manner not warranted by his information, and his act will constitute actionable fraud. Civ. Code, § 1572, subd. 2.

14. Vendor and purchaser ⚷123, 341(3)

Evidence that one purchaser, who acted for both purchasers, discovered vendor's statement to him regarding size of lot was erroneous, and within a week thereafter stated that discovery to vendor and informed him that purchasers had canceled the escrow, and demanded return of deposit, was sufficient to sustain purchasers' action to rescind and recover money paid under the contract. Civ. Code, § 1572, subd. 2.

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Arthur V. Kaufman, Los Angeles, for appellants.

Sprague & Sparks, Los Angeles, for Lumsdens.

Marvin Osburn, Los Angeles, for Block & Co. and Peggy Walker.

SHAW, Presiding Judge.

The plaintiffs brought this action to recover money paid by them as buyers under a contract for the purchase of real estate, alleging that they were induced to enter into the contract by fraudulent misrepresentations as to the dimensions of the property and that they had for this reason rescinded the contract. At the trial a nonsuit was granted, after the plaintiffs completed the presentation of their evidence, and a judgment was entered, "which [it declared] shall operate as an adjudication on the merits in the action." From this judgment the plaintiffs appeal.

The argument in support of this judgment appears to proceed, at least in part, on the theory that the question for decision is, whether findings for the defendants on the merits would be supported by the evidence. Although the respondents do not so state, we surmise that this theory was born of a reading of section 581c of the Code of Civil Procedure, which was enacted in 1947 and took effect before the trial of this action. That section reads as follows: "After the plaintiff has completed his opening statement or the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a judgment of nonsuit. If the motion is granted, unless the court in its order for judgment of nonsuit otherwise specifies, such judgment operates as an adjudication upon the merits." In this case, the court in its order did not otherwise specify.

[1, 2] The problem is thus presented whether section 581c has altered the rule followed in this state before its passage regarding the effect to be given the evidence in considering a motion for a nonsuit. That rule was established without dispute by a multitude of decisions and was thus declared in Milana v. Credit Discount Co., 1945, 27 Cal.2d 335, 342–343, 163 P.2d 869, 873, 165 A.L.R. 621: "A motion for a nonsuit may not be granted where there is evidence of sufficient substantiality to support a finding for the plaintiff, and in arriving at a conclusion on the question the

evidence should be viewed most favorably to the plaintiff with every legitimate inference drawn in her favor and conflicts disregarded." To the same effect, see Blumberg v. M. & T. Incorporated, 1949, 34 Cal.2d 226, 209 P.2d 1, a case which, while decided long after the effective date of section 581c involved a trial held before that date and so has no bearing on the problem above stated. Our answer to this problem is that section 581c was not intended to and has not changed the rule above quoted and that rule must still be followed by the court to which a motion for a nonsuit is addressed.

[3-6] Several matters combine to lead us to this conclusion. In the first place, section 581c provides for "a judgment of nonsuit." In the vocabulary of the law "nonsuit" is a well recognized technical term. "Nonsuit is the name of a judgment given against plaintiff when he is unable to prove his case, or when he refuses or neglects to proceed to the trial of a cause after it has been put at issue, without determining such issue, although the term 'nonsuit' is sometimes broadly applied to a variety of terminations of an action which do not adjudicate the issues on the merits." 27 C.J.S., Dismissal and Nonsuit, § 3, p. 157. It is obvious that section 581c relates to the first phase of the definition here given, for the motion is to be made only at a time when, at a trial, the sufficiency of a plaintiff's showing of his case is open to question. As early as 1850 it was decided that the trial courts of this state have power to take a case from the jury where the plaintiff's proof is not sufficient to support a judgment in his favor, and this action was referred to as the granting of a nonsuit. Ringgold v. Haven, 1850, 1 Cal. 108, 113–115. The case last cited stated a rule as to the mode of considering the evidence on a motion for a nonsuit which, although put in different words, is substantially the same as that above quoted. 1 Cal. 116. Again, in Dalrymple v. Hanson, 1850, 1 Cal. 125, 127, the court said, following the proceeding case, that if the plaintiff's evidence is insufficient in law to support a verdict for plaintiff, or the court would set aside such a verdict as contrary to the evidence, "it is the duty of the court to *nonsuit* the plaintiff." (Emphasis ours.) In Mateer v. Brown, 1850, 1 Cal. 221, 222, 52 Am.Dec. 303, the rule of Ringgold v. Haven, supra, was reaffirmed, the term "nonsuit" was used to describe the order of the court in such a case, and the rule governing the court in passing on a motion for a nonsuit was again declared as in Ringgold v. Haven. Ever since those early decisions the rules stated in them have been repeated whenever necessary and followed, with some variation in the form of stating the rule governing the court in considering the motion until it finally reached the form above quoted, and the term "nonsuit" has at all times been used to refer to a decision reached by an inquiry conducted according to the last mentioned rule, without any weighing of conflicting or opposing evidence or inferences. See Mitchell v. Brown, 1912, 18 Cal.App. 117, 121, 126, 122 P. 426, and cases there cited; also Milana v. Credit Discount Co., supra, and Blumberg v. M. & T. Incorporated, supra. It is also a well recognized practice to grant a nonsuit on plaintiff's opening statement when complete, Wrightson v. Dougherty, 1936, 5 Cal.2d 257, 265, 54 P.2d 13; Paul v. Layne & Bowler Corp., 1937, 9 Cal.2d 561, 564, 71 P.2d 817, although it has been said that it is better to wait until the testimony is all in. 9 Cal.Jur. 550; Emerson v. Weeks, 1881, 58 Cal. 382, 384–385. In view of this long established use of the word 'nonsuit' to designate a decision reached without any consideration of the weight or credibility of the evidence, we should not hold that the legislature intended to provide by its use for a decision based on radically different rules, unless something in the other wording of its enactment compels that conclusion. This we do not find.

[7] By the same statute which placed section 581c in the Code of Civil Procedure as a new section, sec. 581 of that code was amended so as to remove from it all reference to a nonsuit. Before this amendment, the introductory clause of section 581 read, including the matter in brackets: "An action may be dismissed, or a judgment of nonsuit entered, in the following cases:."

By the amendment the bracketed matter was omitted, and the following words were omitted from subdivision 5 of section 581: "By the court upon motion of the defendant when upon the trial the plaintiff fails to prove a sufficient case." The matter thus omitted from section 581 is descriptive of a nonsuit as it has been known and understood throughout the legal history of this state, and it is clear that the legislature intended to continue the use of the nonsuit procedure and merely moved it from one section to another for greater convenience of statement and amendment without intending to alter it except in some particulars hereinafter discussed.

[8] This statute added to section 581c the provision that a judgment of nonsuit, unless otherwise ordered, "operates as an adjudication upon the merits." This undoubtedly changes the former rule as to the effect of a nonsuit. As indicated by some of the authorities already cited, a nonsuit suffered for any cause has not been a bar to a subsequent suit on the same cause of action or an adjudication of any of the issues. Mohn v. Tingley, 1923, 191 Cal. 470, 478, 217 P. 733; Bollinger v. Nat. Fire Ins. Co., 1944, 25 Cal.2d 399, 403, 154 P.2d 399; Anglo-California Nat. Bank v. Superior Court, 1936, 15 Cal.App.2d 676, 679, 59 P.2d 1053; Ridley v. Young, 1944, 64 Cal.App.2d 503, 508, 149 P.2d 76. Consequently, a plaintiff who was nonsuited could at once begin another action for the same cause, and could repeat this procedure as often as he pleased without being affected by the former decision or decisions. Plaintiffs occasionally took advantage of this possibility by bringing repeated actions, either to harass and annoy defendants, or in the hope of gaining something by way of settlement, or for both purposes. Then, too, there were cases where it was obvious that the evidence produced by the plaintiff was all that could be had in support of his action; and if it was insufficient, time could be saved by ending the matter with an adjudication at the close of his case without hearing evidence for the defendant. To take care of these, and perhaps other situations, the legislature deemed it advisable to confer upon the court a discretion to make a nonsuit a bar to another action. But to accomplish any such purpose it was not necessary to change the rule regarding the mode in which the court should consider the evidence in passing on a motion for a nonsuit, and it is clear to us that the legislature has not done so.

[9–13] Applying the foregoing rules to the evidence here, we conclude that the court erred in granting the nonsuit. The defendants Lumsden were the owners of the land the plaintiffs agreed to buy. There was evidence from which it could be inferred that in making the agreement the plaintiffs relied on an erroneous statement of the size of the lot in question, made by one of the Lumsdens and apparently acquiesced in by the other. It was agreed that the correct dimensions of the lot on its four sides were, 77.82 feet, 80 feet, 90.47 feet, and 80.99 feet. On it there was a house. According to testimony for the plaintiffs, when the defendant Walker, a real estate sales agent, showed the plaintiffs a listing slip on which the correct dimensions of the lot were given (omitting fractions of a foot) and stated that the lot was approximately 80 feet x 90 feet, one of the defendants Lumsden interrupted and said: "You are wrong, Miss Walker, it is approximately 100 feet square." This is a positive statement of a fact which could well be regarded as material purchase. De Bairos v. Barlin, 1920, 46 Cal.App. 665, 670, 190 P. 188; Dohrman v. J. B. Roof. Inc., 1930, 108 Cal.App. 456, 463, 291 P. 879; Younis v. Hart, 1943, 59 Cal.App.2d 99, 103, 138 P.2d 323. The owner of land is presumed to know the boundaries and area of his land, and a buyer is justified in relying upon his representations in regard to such facts. Eichelberger v. Mills Land & Water Co., 1908, 9 Cal.App. 628, 634, 100 P. 117; Del Grande v. Castelhun, 1922, 56 Cal.App. 366, 368, 205 P. 18; Dohrman v. J. B. Roof. Inc., supra, 108 Cal.App. 464, 291 P. 879. The fact that the plaintiffs saw the listing agreement which correctly stated the size of the lot does not prevent them from relying upon the defendant's positive statement that it was wrong. Younis v. Hart, supra, 59 Cal.App.2d 104, 138 P.2d 323; Eichelberger v. Mills Land & Water Co., supra, 9 Cal.App. 638, 100 P. 117. The plaintiff was not bound to prove that the defendant's knowledge that his statement of the size of the lot was untrue. Del Grande v. Castelhun, supra, 56 Cal.App. 367–368, 205 P. 18. Not only was the defendant presumed to know the truth on this matter, as stated by the authorities above cited, but it has also been said that it is the vendor's *duty* to inform himself regarding it. De Barios v. Barlin, supra, 46 Cal.App. 670, 190 P. 188. Even if the defendant's lack of knowledge on the subject be assumed, it is inferable that he made his statement in a manner not warranted by his information, which would also constitute actionable fraud, Civil Code, section 1572, subd. 2.

[14] There is also evidence from which it could be found that the plaintiffs rescinded the agreement and did so promptly. The plaintiff Louis Salomons, who apparently acted for both plaintiffs, testified that about two weeks after the agreement was made he discovered that the defendant's statement made to him regarding the size of the lot was erroneous, and within a week thereafter he stated this discovery to the defendant W. D. Lumsden, informed him that the plaintiffs had cancelled the escrow, and demanded the return of the deposit for which the plaintiffs now sue. This is sufficient to support a finding of a formal rescission, if any rescission prior to suit is necessary in this case, which we do not decide.

The defendant W. D. Lumsden admitted that he told one plaintiff it was his understanding that the lot was 100 feet x 100 feet, but said he added to that the further statement, "but that the records will show." This, if coupled with a showing that he was ignorant of the actual dimensions and believed what he said, might put a different face on the matter and support a finding that there was no fraud; but on the motion for a nonsuit that view of the evidence cannot be taken. Possibly on that view of the evidence a mutual mistake might be found, but mistake is not pleaded in the present complaint.

The judgment is reversed.

BISHOP and STEPHENS, JJ., concur.

95 Cal.App.2d 577

MOEN v. ART'S CAFE et al.

Civ. 4102.

District Court of Appeal, Fourth District, California.

Jan. 12, 1950.

Action by O. E. Moen against Art's Cafe, a copartnership, A. L. Uecher, A. Stone and W. Stone, individually and as copartners, doing business under the fictitious firm name and style of Art's Cafe, to recover on a book account.

The Superior Court of San Bernardino County, A. D. Mitchell, J., entered judgment for plaintiff against Art's Cafe, A. Stone and W. Stone, and in favor of defendants Arthur L. Uecher and Pauline Uecher, and plaintiff appealed.

The District Court of Appeal, Mussell, J., held that the complaint failed to state facts sufficient to establish liability of other two defendants under any theory of equitable estoppel.

Judgment affirmed.

1. Partnership ⟹213(1)

The statute providing that when a person represents himself or consents to another representing him to anyone, as a partner in an existing partnership, he is liable to that person, who has on faith of representation given faith to the actual or apparent partnership, is founded upon doctrine of equitable estoppel, and a plaintiff who relies upon statute must plead facts establishing estoppel in order to support a judgment against party holding himself out as partner. Corporations Code, § 15016.

2. Appeal and error ⟹193(9)

The objection that a complaint does not state facts sufficient to constitute a cause of action is an exception to rule that a complaint cannot be questioned for first time on appeal.

3. Partnership ⟹213(1)

Complaint containing only general allegations that defendants became indebted to plaintiff's assignors upon book accounts for sale and delivery of liquor, that accounts were assigned to plaintiff, and that balances were due thereon, and containing no allegation of existence of a partnership between parties defendant, ostensible or otherwise, or that any credit was extended to parties by reason of any words, acts or conduct on their part, did not state facts sufficient to establish liability based on estoppel to deny partnership. Corporations Code, § 15016.

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Craig, Weller & Laugharn, Thomas S. Tobin, Los Angeles, Joseph T. Ciano, San Bernardino, for appellant.

Joseph V. Mazziotta, Carl B. Hilliard, San Bernardino, for respondents.

MUSSELL, Justice.

In this action on a book account plaintiff appeals from a judgment in favor of defendants Arthur L. Uecher and Pauline Uecher, on the sole ground that the evidence establishes the existence of an ostensible partnership and partnership by estoppel between the Uechers and defendants Wilbur H. and Aldine V. Stone.

Plaintiff was the assignee of certain claims of wholesale houses for balances due by reason of the failure of defendants to pay for liquor sold to them as operators of a restaurant known as Art's Cafe in the city of Colton. On January 10, 1947, the Uechers, who, prior to that time, had operated the business, leased it to the Stones until January 12, 1952. The lease was not recorded and contained a provision that the liquor license was to be taken out in the names of Arthur L. Uecher and Wilbur H. Stone. Ten days after the execution of the lease the defendants Arthur L. Uecher, Pauline R. Uecher, Wilbur H. Stone and Aldine V. Stone signed an application to the State Board of Equalization for the transfer of the on-sale liquor business and pursuant to the application, a license was issued in the names of the four signers of the application. The liquor sold by the plaintiff's assignors was delivered to the cafe to the Stones and billed to the four defendants whose names appeared on the license. The cafe business was conducted by the Stones as lessees, and such of the liquor bills as were paid appear to have been paid by checks signed by Wilbur H. Stone.

The lease provided for a monthly rental in the sum of $450.00 or 8% of the gross receipts of the business, whichever sum was the greater, and lessees were the sole proprietors of the business and premises.

The trial court found that the defendants A. Stone and W. Stone became indebted to the plaintiff's assignors in the total amount of the claims presented upon open book accounts for liquor sold and delivered to them and gave judgment against the Stones for the balance due. It was further found that the lessors did not participate actively in the operation of the cafe business and that the lessees purchased the merchandise herein involved from the plaintiff's assignors. The judgment also provided that plaintiff was entitled to nothing as against defendants Arthur L. and Pauline R. Uecher. Plaintiff finds no fault with the judgment in his favor against the Stones, but contends that the court should have rendered judgment in his favor against the Uechers on the ground that an ostensible partnership and partnership by estoppel was established between the Uechers and Stones.

This contention is based on the provisions of section 2410 of the Civil Code, now incorporated in section 15016 of Corporations Code, which section, as far as is here applicable, is as follows:

"(1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

"(a) When a partnership liability results, he is liable as though he were an actual member of the partnership."

[1] The rule of responsibility and liability declared in this section of the Civil Code is founded upon the doctrine of equitable estoppel. Nofsinger v. Goldman, 122 Cal. 609, 614, 55 P. 425. A plaintiff who relies upon the doctrine of equitable estoppel as declared in said section of the Civil Code must plead the facts establishing such estoppel in order to be entitled to make proof of the same or to have the benefit of a finding predicated upon the section and hence sufficient to support a judgment against one who, while not an actual partner has estopped himself to deny that he is not so by his representations made in that behalf and by the reliance of the creditors of the firm thereon. Dodd v. Tebbetts, 198 Cal. 333, 340, 244 P. 1081.

The complaint in the instant action is on book accounts and contains only general allegations that the defendants became indebted to plaintiff's assignors upon book accounts for the sale and delivery of goods, wares and merchandise; that the accounts were assigned to plaintiff and that balances were due thereon. There is no allegation of the existence of a partnership between the parties defendants, ostensible or otherwise. It is not alleged that the Uechers, or either of them, represented themselves as members of a partnership, nor is it alleged that the plaintiff's assignors extended credit to the Uechers by reason of any words, acts or conduct of these two defendants. Evidence was admitted, over objection by the defendants, that the liquor license was obtained in the name of the Uechers and Stones but there was no pleading upon which the court could base a finding of the existence of an ostensible partnership or of an estoppel.

[2, 3] The contention is made by plaintiff that the sufficiency of the complaint cannot be questioned for the first time on appeal. However, the objection that the complaint does not state facts sufficient to constitute a cause of action is an ex-

ception to the rule. 2 Cal.Jur., p. 257, Sec. 78; Carnahan v. Motor Transit Co., 65 Cal.App. 402, 407, 224 P. 143; Young v. Laguna Land Co., 53 Cal.App. 178, 180, 199 P. 810. Where, as here, the complaint fails to state facts sufficient to establish liability under section 2410 of the Civil Code, relied upon by plaintiff, the contention is without merit.

Judgment affirmed.

GRIFFIN, Acting P. J., concurs.

95 Cal.App.2d 570

CAMPBELL et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 4025.

District Court of Appeal, Fourth District, California.

Jan. 12, 1950.

Compensation proceeding by Maggie Bradley and Archie Dockster, a minor, by his guardian ad litem and trustee, Maggie Bradley, against Loy Campbell and Fireman's Fund Indemnity Company, a corporation. The Industrial Accident Commission entered a maximum death benefit award to claimants, and defendants filed a petition to review and annul the award.

The District Court of Appeal, Mussell, J., held that the evidence was insufficient to sustain finding that decedent was regularly employed previous to the accident and that the formula set forth in statute should not have been applied by the Commission.

Award annulled and case remanded to Commission.

1. Workmen's compensation 🔑920

Where decedent was employed on a temporary basis at time of accident, and record contained no evidence that decedent was regularly employed at time of his death or for a long time prior thereto, compensation award based on statute providing that where employment is for 30 or more hours a week and for 5 or more working days a week, average weekly earnings shall be 95% of number of working days a week times daily earnings at time of injury, without considering element of discontinuity in decedent's employment, was erroneous. Labor Code, §§ 4451, 4453(a–d), 4702.

2. Administrative law and procedure 🔑791
Workmen's compensation 🔑1939

Reviewing court has no authority to disturb compensation award for insufficiency of evidence where findings are supported by substantial evidence.

3. Workmen's compensation 🔑912

Evidence that decedent at time of injury in course of employment, had no regular employment, was not regularly employed by party for whom he was working when he was injured, had apparently retired from labor market on old age pension and security benefits, and employment in which he was injured was foreign to him, did not support maximum death benefit award to decedent's surviving widow and minor grandchild under statute applicable to regularly employed individuals notwithstanding injury caused decedent's death. Labor Code, §§ 4451, 4453(a–d), 4702.

Keith, Creede & Sedgwick, San Francisco, for petitioners.

T. Groezinger, Robert Ball and Alvin L. Dove, San Francisco, for respondent Industrial Accident Commission.

Adoph Feierbach, Visalia, for respondents, Maggie Bradley and Archie Dockster.

MUSSELL, Justice.

Petitioners seek a review and annulment of a maximum death benefit award to decedent's surviving widow and her minor grandchild.

Samuel H. Bradley, aged 75, was employed temporarily as an irrigator on a ranch owned by petitioner, Loy Campbell, near Visalia, California. While so employed on July 12, 1948, Bradley fell into a pit and sustained injuries from which he died on that date.

About a year and a half prior to his death, Bradley applied for and received old age pension through the State of California in the sum of $63.00 per month. He was permitted by Loy Campbell, for whom he had worked in prior years, to live in an unoccupied cabin on the Campbell ranch, rent free. He performed no services in exchange for the use of the cabin but did occasional chores around the ranch, for which he was not paid, but in return for which he was allowed the use of a cabin, lights, water and wood, considered by Mr. Campbell to be of the value of $12.50 per month. His total earnings from Campbell from January 1, 1948, to the date of his death on July 12th of that year amounted to the sum of $59.00.

On July 9, 1948, Campbell sent his regular irrigator to a sawmill which he operated, to help out for a few days on some temporary work. He requested Bradley to take over the irrigating on the ranch until the regular irrigator returned and estimated that there was from a week to ten days irrigating yet to be done at the time of Bradley's death. Bradley fixed his own hours and kept a record of his time. He was paid 75¢ an hour and worked 8 hours on July 9th, 10 hours on July 10th and 6 hours on July 11th. For the three days work, Bradley earned a total of $18.00 or an average of $6.00 per day.

Maggie Bradley, aged 64, his widow, filed an application with the Commission, alleging that she was dependent upon Samuel H. Bradley and included also as a dependent, Archie Dockster, aged 12, her grandson, who was living with her. The boy was mentally retarded and at the time of decedent's death, Maggie Bradley was receiving the sum of $82.00 a month from the State Welfare Department for his care.

On May 24, 1949, respondent Commission issued its findings and award wherein a maximum death benefit of $7500.00 was awarded to Mrs. Bradley and to Archie Dockster.

Petitioner sought a rehearing before the Commission and upon a denial thereof, a petition for writ of review was filed in this court.

The first question to be determined on this appeal is whether the average annual earnings of the decedent were sufficient to entitle the applicant to the maximum death benefit provided for in Section 4702 of the State Labor Code. This section sets forth the formulae for determining death benefit and fixes the maximum and minimum benefits payable, the pertinent provisions of which are as follows:

"The death benefit shall be a sum sufficient to equal:

"(a) In a case of total dependency, four times the average annual earnings of the deceased employee.

"(b) In a case of partial dependency only, four times the amount annually devoted to support of the dependents by the employee.

"The death benefit shall be paid in installments in the same manner and amounts as disability indemnity, payments to be made at least twice each calendar month, unless the commission otherwise orders. Except as provided in the next paragraph the death benefit, when added to all accrued disability indemnity, shall not exceed four times the average annual earnings of the employee, nor exceed the sum of six thousand dollars ($6,000), except in the case of a surviving widow with one or more dependent minor children, in which case the death benefit shall not exceed seven thousand five hundred dollars ($7,500) and, except as otherwise provided in Sections 4553 and 4554. For a total dependency the minimum death benefit shall be three thousand dollars ($3,000)."

It is conceded that Mrs. Bradley is a total dependent. Therefore, the death benefit should be four times the average annual earnings of the decedent. The definition of "average annual earnings" is contained in Labor Code sections 4451 and 4453. Under the latter section, the formulae for determining average weekly earnings fall into four catagories:

(a) Where employment is thirty or more hours a week and for five or more days a week;

(b) Where the employee works for two or more employees;

(c) Where earnings are at an irregular rate such as piece work or commission basis or specified to be by week, month or other period; and

(d) Where employment is for less than thirty hours or the foregoing methods are inapplicable.

Of these four formulae, only (a) and (d) are involved in this case. Subsection (a) is as follows: "(a) Where the employment is for 30 or more hours a week and for five or more working days a week, the average weekly earnings shall be 95 per cent of the number of working days a week times the daily earnings at the time of the injury."

Subsection (d) reads as follows: "(d) Where the employment is for less than 30 hours per week, or where for any reason the foregoing methods of arriving at the average weekly earnings cannot reasonably and fairly be applied, the average weekly earnings shall be taken at 95 per cent of the sum which reasonably represents the average weekly earning capacity of the injured employee at the time of his injury, due consideration being given to his actual earnings from all sources and employments."

The Commission contends that the provisions of either subdivision (a) or subdivision (d) of section 4453 were appropriate in the instant case and justified the death benefit award of $7500.00 and the petitioners maintain that the provisions of subdivision (a) of Labor Code section 4453 were inappropriate and that although the provisions of subdivision (d) were appropriate, the maximum death benefit of $7500.00 based thereon was improper under the facts.

[1] The decedent was employed on a temporary basis at the time of the accident and the record does not contain evidence upon which it could be found that the decedent was regularly employed at the time of his death and for a long time prior thereto, yet the commission computed the decedent's average earnings under subdivision (a) of Labor Code section 4453 on the basis that his employment was full-time, that is, in excess of the statutory minimum therefor—the 30-hour, 5-day week. However, it is not fair and reasonable to use such a formula where the element of discontinuity in decedent's employment is ignored. Accordingly, the award is sustainable only if computed correctly under subdivision (d), the earning capacity subdivision. West v. Industrial Accident Commission, 79 Cal.App.2d 711, 724, 180 P.2d 972, 980. In that case, the respondent, a 60 year old woman, was hired by petitioner for $35.00 a week, plus room and board, as a practical nurse for petitioner's bedridden husband. Six days after her employment, a porch swing at petitioner's residence fell to the floor while respondent was sitting in it. Respondent claimed that her back was injured, the Commission so found and issued an award computed on the ground that respondent's employment was full-time and in discussing the application of subdivision (d) of Labor Code section 4453, the court said: "Respondent was working as a practical nurse at the time of the accident. Such employment is by its very nature intermittent. A practical nurse goes from case to case. Continuity of such employment is the exception rather than the rule. Yet the commission computed respondent's average earnings under subdivision (a) on the ground that her employment was full-time, that is, in excess of the statutory minimum therefor—the thirty-hour, five-day week. We note that an equally good prima facie case exists for computing them under subdivision (c) in view of the fact that her earnings were specified to be by the week. But it is unnecessary to decide this point. Neither (a) nor (c) can be used if they 'can not reasonably and fairly be applied.' If such a situation exists, resort must be had to subdivision (d). This is the situation here. It is not fair and reasonable to use either (a) or (c) because they both ignore the element of discontinuity in respondent's employment. Cf. Neahr v. Industrial Acc. Comm., 1936, 13 Cal.App.2d 146, 56 P.2d 568; Mahaffey v. Industrial Acc. Comm. 1917, 176 Cal. 711, 171 P. 298."

It was held that respondent's average earnings were erroneously computed on the basis of full-time employment under subdivision (a) and were not computed correctly under subdivision (d), and that the decision in Neahr v. Industrial Accident Commission, 13 Cal.App.2d 146, 56 P.2d 568, correctly interprets subdivision (d) as applied to intermittent employees.

In the Neahr case, the commission, in fixing applicant's rate of pay as a riveter, based it both upon the surrounding circumstances effecting his earning ability and his work as a riveter, and his work other than as a riveter, for periods of time he was employed within the year preceding the date of his injury and not upon the rate of pay fixed for the type of employment that he was engaged in at the time of the accident. The award made on this basis was affirmed.

[2, 3] In the instant case, Bradley had no regular employment. He was not regularly employed by petitioner Campbell and had apparently retired from the labor market on old age pension and security benefits. His total earnings from employment by Campbell during 1948 amounted to but $59.00. He had no past history of employment as an irrigator and the record does not disclose that he followed any regular calling. The commission ignored his past history of employment and computed his earning capacity solely on the rate of pay at the time of the accident. As was said in the West case, supra: "To take the rate of pay at the time of injury and apply it on a full-time basis in computing earning capacity at that time is to ignore an established incident of intermittent employment—its discontinuity. The result may often be to give to the disabled employee a greater income from a compensation award for idleness during disability than he received while working and to bestow upon him an income far in excess of his true earning capacity. When so administered a law, the fundamental purpose of which is to shift merely a portion of the loss in earning capacity of the disabled employee from such employee and his dependents, is distorted into a device whereby it would be more profitable to be on compensation than it would be to work. Such an administration of the workmen's compensation law would invite both carelessness on the job and malingering and is therefore contrary to public policy."

While the rule is as stated in the Neahr case, supra, that "The reviewing court has no authority to disturb an award for insufficiency of the evidence when there is substantial evidence to support the findings" [13 Cal.App.2d 146, 56 P.2d 570], we are unable to find sufficient support in the record for the award here made.

In the case of California Compensation Ins. Co. v. Industrial Acc. Comm., 86 Cal.App.2d 861, 195 P.2d 880, cited by the commission, an award for the maximum death benefit was affirmed where the decedent, a gardner, was employed to clean up a garden at the rate of $2.00 per hour on a job that was estimated to last five or six days, during the course of which decedent fell and suffered injuries that ultimately caused his death. The award computed under subdivision (a) of section 4453 of the Labor Code was affirmed on the basis of the amount decedent was earning when injured. The evidence showed that the decedent, who died in March, 1947, had worked intermittently during the year 1946, but that in 1947 he was in excellent health, worked regularly and steadily and the court distinguished the case from that of the West case, supra, for these reasons. In the instant case, however, as noted, there is no evidence in the record that the decedent, Bradley, was steadily employed previous to the accident. Under the facts disclosed by the record before us, it would not be reasonable or fair to apply the earnings of the decedent for the three days preceding his death as a measure of his earnings for an average week because that presupposes an actual ability to earn approximately $6.00 per day throughout an entire year. Consequently, the formula that is set forth under subsection (d) of Labor Code section 4453 was not correctly applied by the commission in the instant case and the maximum award of $7500.00 should not have been made.

In view of what we have here said relative to the maximum award made, it is unnecessary to decide the question of whether Archie Dockster was a dependent child of Samuel H. Bradley within the meaning of the Labor Code.

We conclude that the award must be annulled as the result of an erroneous application of the law and as unreasonable. Labor Code section 5952. The case is remanded to the commission for future proceedings not inconsistent with this opinion.

GRIFFIN, Acting P. J., concurs.

95 Cal.App.2d 580

HOWARD v. SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS et al.

Civ. 16956.

District Court of Appeal, Second District, Division 3, California.

Jan. 16, 1950.

Action by Austin F. Howard against the Southern California Associated Newspapers, a California corporation doing business under the fictitious firm name and style of Glendale Newspress, and others, for libel for publishing an article which reflected upon the recall movement for certain city councilmen of which plaintiff was the chairman of the committee sponsoring the recall.

From judgments of the Superior Court of Los Angeles County, Stanley N. Barnes, J., sustaining demurrers of defendants without leave to amend and entering judgments of dismissal, plaintiff appealed.

The District Court of Appeal, Shinn, P. J., held that the article was not libelous per se and that the retraction published by the defendant newspaper was sufficient to constitute a withdrawal of any implied charges against the good character and motives of plaintiff.

Judgments affirmed.

1. Libel and slander 🔑10(1)

A letter written by a contributor to a newspaper eliminating the last two sentences thereof expressing certain views concerning the recall movement of certain city officials, which letter was published in defendant newspaper, was not defamatory so as to authorize recovery of damages therefor by chairman of the committee sponsoring the recall. Civ.Code, §§ 45a, 48a, and subds. 1, 4(b).

2. Libel and slander 🔑123(1)

Whether a publication is libelous per se is a question of law.

3. Libel and slander 🔑19

In determining whether an article is libelous, the article must be read as a whole in order to understand its import and the effects which it was calculated to have upon the minds of those who read it, and if it can reasonably be given an innocent interpretation and meaning it is not libelous per se.

4. Libel and slander 🔑48(2)

Publication seeking to convey pertinent information to the public in matters of public interest such as recall elections, are permitted wide latitude, particularly in controversies of a political nature, and mere expressions of opinion or severe criticism are not libelous if they clearly go only to the merits or demerits of a condition, cause or controversy which is under public scrutiny, even though they may adversely reflect upon public activities or fitness for office of individuals who are intimately connected with the principal object of the attack.

5. Libel and slander 🔑10(1)

Where an article published in a newspaper does not charge anything that would follow plaintiff into his private life and stamp him as dishonest or bring upon him in the capacity of a private citizen the contempt of his fellows it is not libelous.

6. Libel and slander 🔑48(1)

Expression of views of readers in newspapers dealing with matters of news of public interest which are addressed to the merits or demerits of the issue are not actionable if they appear as opinions only and not as direct or covert statements of fact which are detrimental to the character of the individual upon whom they reflect.

7. Libel and slander 🔑6(1)

Portion of article printed by a newspaper and contributed by a reader constituting only an expression of opinions and view of the reader respecting merits of recall movement of which plaintiff was chairman of the committee sponsoring the recall and which was devoid of statements of fact but denounced the recall movement and referred to the committee as a disgrace to the city and a dangerous and unjust element, and which when considered with the article as an entirety, question the good faith of the recall without casting doubt upon the character of the members of the recall committee, was not libelous per se. Civ.Code, §§ 45a, 48a, and subds. 1, 4(b).

8. Libel and slander ⚷66

In action by chairman of committee sponsoring recall of city councilmen against newspaper for publishing an article of defendant reader denouncing the recall movement, retraction of the newspaper was sufficient as an adequate withdrawal of any implied charges against the good character and motives of plaintiff.

9. Libel and slander ⚷98

In action for libel, where weakness of complaint lay in failure of plaintiff to allege special damage, and he had one opportunity to add an allegation and failed to do so, refusing to grant plaintiff another opportunity to amend was not an abuse of discretion.

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Paul S. Crouch, Los Angeles, for appellant.

O'Melveny & Myers, Jackson W. Chance, Deane F. Johnson, Los Angeles, for respondent Southern California Associated Newspapers.

Aubrey N. Irwin and Henry Melby, Glendale, for respondents Donald E. Close and W. E. Close.

SHINN, Presiding Justice.

On July 16, 1948 an election was pending in the City of Glendale for the removal from office of certain city officials. Plaintiff Howard was chairman of the committee sponsoring the recall. Glendale News-Press, a newspaper published in Glendale by Southern California Associated Newspapers, was opposed to the recall. Its columns were open for the expression of the views of the contending factions. Donald E. Close, a minor, the son of W. E. Close, allegedly acting in concert with his father, expressed certain views concerning the recall movement in a letter which was published by the newspaper.[1] Plaintiff thereupon sued the newspaper, Donald E. Close and W. E. Close for libel, alleging that the statements were false and were published with actual malice. The three quoted writings were attached to the complaint as exhibits. The original complaint contained no allegation of special damage suffered by plaintiff. Demurrers of defendants were sustained with leave to amend. An amended complaint was filed which also failed to allege special damage. Demurrers to the amended complaint were

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[1] It reads as follows: "Charges Lacking Editor, News Press: After reading the most insufficient yet entire statement of Austin F. Howard which appeared recently, it has occurred to me that the recall movement in Glendale is not only a blot on our clean and splotless civic record, but is also childish in aspect. I refer specifically to the following words of Chairman Howard: 'The Chief argument against the recall is that no charges of a criminal act have been made. We would not attempt to dishonor any name without legal proof of criminal acts.' As I pointed out before shortly after the beginning of the recall, definite proof was lacking. After coming away from that first meeting, it was evident that, while Mr. Howard had succeeded in painting a very black picture of civic affairs, he had failed to make any pointed charges, ascribe any definite proof to his statement, or connect any of those so-called 'deplorable' conditions to our very efficient City Council. Now in his own words he has admitted that proof is lacking—in fact he has stated that no charges exist. While for some unknown reason the state laws provide that a recall election may be held even in view of the fact that charges are missing (which was generally emphasized by recall officials at their meeting), it stands to reason that so in a trial both evidence and proof must be present before a conviction can be made. This applies as much if not more so to a municipal recall where not only the city's name but the names of prominent municipal officials are at stake. The general 'charge' that taxation without representation exists is absolutely ridiculous as any alert citizen has already perceived. By installation of the parking meters the city has not imposed a tax in the ordinary sense of the word, but rather has attempted to solve the downtown traffic problem. It has been pointed out that the meters were only a trial to test their efficiency, but even so they have received the support of many civic organizations. I say again, 'The meters will not cost the city a cent.'

Directly they have proved themselves a benefit because already the city has felt able to use the money so earned for constructing off-street parking facilities. No asset has ever been considered a financial burden. As long as the city shows such assets which have been brought about by the meters, no one could say that the meters are a cost. The entire arrangement for their installation was ideal—any business concern would readily wish for such a contract as was given to the city. In the light of what has already been said in opposition to the recall and what I have added above, it cannot be denied that the recall movement is entirely illegitimate, a mala fide attempt to discredit noble and honorable officials who have served our city long and well. This sinister movement must not be permitted to continue to malign the democratic foundations of our city government. Mr. Howard and his entire recall committee have proved themselves a disgrace to Glendale, and it should be the desire of every citizen to destroy this dangerous and unjust element by casting his vote against the recall.—Donald E. Close."

On July 20, 1948 Howard presented to the newspaper a communication reading as follows: "Demand is hereby made that you retract certain statement which was published in your paper July 16, 1948, on Page 4-A under an article entitled Letters to the News-Press, and purportedly signed Donald E. Close. Particular reference is made to the last paragraph of said article which reads as follows: 'In the light of what has already been said in opposition to the recall and what I have added above, it cannot be denied that the recall movement is entirely illegitimate, a mala fide attempt to discredit noble and honorable officials who have served our city long and well. This sinister movement must not be permitted to continue to malign the democratic foundations of our city government. *Mr. Howard and his entire recall committee have proved themselves a disgrace to Glendale, and it should be the desire of every citizen to destroy this dangerous and unjust element by casting his vote against the recall.*—Donald E. Close.' You are notified that Mr. Austin F. Howard considers the statements libelous in nature. Demand is further made that you publish this retraction so that it comes within the Provisions of Section 48a Civil Code, and your particular attention is called to the following Provision of said Code. 'If a retraction or correction thereof be not published in as conspicious a place and type in said newspaper as were the statements complained of, in a regular issue thereof published within two weeks after such service, plaintiff may allege such notice, demand, and failure to retract in his complaint and may recover both actual, special and exemplary damages if his cause of action be maintained.'"

On July 30, 1948, the Glendale News Press published the following retraction: "A Statement On July 16, 1948, in the 'Letters' column, the News-Press published a letter from Donald E. Close addressed to the editor of the News-Press and referring to the pending recall election. Austin F. Howard and his attorney have advised the News-Press that they regard statements contained in the last paragraph of the letter as libelous in nature. We disagree that such is the case and further state that we did not intend to publish any statement accusing Mr. Howard or the Recall Committee of having improper motives or acting illegally. The News-Press viewed Mr. Close's letter as being only an expression of opinion in connection with the recall election and printed such pursuant to its policy of publishing statements from both sides on this important matter. In our view this letter from Mr. Close represents part of the give and take present in every political campaign and should not be construed as accusing anyone of unlawful or reprehensible motives or actions. As readers of this paper know, the News-Press has an honest difference of opinion with Mr. Howard and the Recall Committee on the recall election, but in fairness to the public we have published statements and letters from Mr. Howard and others who favor the recall, that cannot be said to be complimentary to the News-Press. We do not believe and have not intended to assert that Mr. Howard or the Recall Com-sustained without leave to amend and although a single judgment would have sufficed, separate judgments of dismissal were entered in favor of the defendants. Plaintiff appeals.

[1] Since the case arises on demurrer, we shall assume the sufficiency of the complaint to allege that the statements published by defendants were both false and unprivileged. Although plaintiff's demand for a retraction related only to the last two sentences of the article the complaint alleged the falsity of the entire publication. We shall discuss, chiefly, the statements embraced within the demand. As to the remainder of the article we shall say, only, that it clearly was not defamatory. It is therefore unnecessary to pass upon the contention of the defendants that a claim of libel in such a case is limited to the statements specified in the demand for retraction.

"Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof." Civ.Code, sec. 45a. Special damages are "all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other". Civ.Code, sec. 48a, subd. 4(b). If the person claiming to have been libeled, within 20 days after knowledge of the publication, demands a retraction specifying the statements claimed to be libelous and if the publisher fails for three weeks after the demand to publish a correction in substantially as conspicuous a manner as the allegedly libelous statement, recovery may be had of general, special, and, in proper cases, exemplary damages. Unless demand is made and no proper retraction is published the plaintiff can recover only special damages. Civ.Code, sec. 48a(1).

Since the complaint seeks only general damages, the questions are presented whether the publication was libelous on its face and, if so, whether the retraction was sufficient.

[2] The questioned article must be examined with certain general principles in mind. Whether a publication is libelous per se is a question of law. Peabody v. Barham, 52 Cal.App.2d 581, 584, 126 P.2d 668.

[3] In determining whether or not it is libelous, the article must be read as a whole in order to understand its import and the effects which it was calculated to have upon the minds of those who read it. Blake v. Hearst Publications Incorporated, 75 Cal. App.2d 6, 11, 170 P.2d 100.

If it can reasonably be given an innocent and harmless interpretation and meaning it is not libelous per se. Washer v. Bank of America, 21 Cal.2d 822, 828, 136 P.2d 297, 155 A.L.R. 1338; Babcock v. McClatchy Newspapers, 82 Cal.App.2d 528, 538–539, 186 P.2d 737.

[4] Publications by which it is sought to convey pertinent information to the public in matters of public interests are permitted wide latitude. In controversies of a political nature, in particular, the circumstances often relieve statements, which might otherwise be actionable, of possible defamatory imputations. Mere expressions of opinion or severe criticism are not libelous if they clearly go only to the merits or demerits of a condition, cause or controversy which is under public scrutiny, even though they may adversely reflect upon the public activities or fitness for office of individuals who are intimately connected with the principal object of the at-

> mittee represent a sinister movement or that they are a disgrace to Glendale. We only disagree with their position on the recall election and believe that the public's interest will be served best by a majority vote against the recall. Any other interpretation of our printing Mr. Close's letter is erroneous and is hereby corrected. We shall continue to print the views of all parties and believe that by so doing the voters of Glendale will be aided in casting their ballot in the recall election."

tack. Babcock v. McClatchy Newspapers, supra; Eva v. Smith, 89 Cal.App. 324, 264 P. 803; Taylor v. Lewis, 132 Cal.App. 381, 22 P.2d 569; Harris v. Curtis Publishing Co., 49 Cal.App.2d 340, 121 P.2d 761; Wilson v. Stockholders Pub. Co., Inc., 4 Cal.2d 724, 52 P.2d 913.

These familiar rules have direct application to elections for the recall of public officials. See Maher v. Devlin, 203 Cal. 270, 263 P. 812, recall of mayor and city council; Taylor v. Lewis, supra, recall of city councilman.

The statements of the portion of the article protested by plaintiff were prefaced by a reference to the parking meter issue and to the asserted fact that the sponsors of the recall had made no specific charges or accusations against the officials. It was asserted that no "pointed" charges of misconduct had been made against the councilmen, no proof offered to connect them with the "deplorable" conditions which plaintiff claimed to exist, and that plaintiff had conceded as much. The concluding paragraph, which assumed the truth of the preceding statements, appears to be only an expression of the opinions and views of the author respecting the merits of the recall movement. It was devoid of statements of fact. It denounced the recall movement, calling it "illegitimate," "a mala fide attempt" to discredit the officials, a "sinister movement," and it referred to the recall committee as a "disgrace to Glendale," and as a "dangerous and unjust element" that must be destroyed by defeating the recall. Considered with the preface, as the author said it should be, the final paragraph merely enlarged upon the idea that no sufficient cause was being advanced for the recall of the councilmen. The justness and good faith of the recall were questioned without any words casting doubt upon the character of the members of the recall committee or the integrity of their actions apart from their active support of the recall.

[5] In the words of the court in Taylor v. Lewis, 132 Cal.App. 381, 386, 22 P. 2d 569, 572, the article "* * * does not charge any thing that would follow appellant into his private life and stamp him as dishonest or bring upon him in the capacity of a private citizen the contempt of his fellows", etc. This, we take to be a proper test on a charge of libel of words spoken or written concerning those who are participating on one side or the other of a political issue.

[6, 7] It is a common practice for newspapers to publish communications from their readers dealing with matters of news or public interest. Expressions of views which are addressed to the merits or demerits of the issue are not actionable if they appear as opinions only and not as direct or covert statements of fact which are detrimental to the character of the individuals upon whom they may reflect. We conclude that the article in question was not libelous per se.

[8] Although it is unnecessary to carry this opinion further, we may add that the retraction published by the newspaper, as quoted, appears to us to be as full and fair as plaintiff had a right to expect. We do not see how anyone who read the communication from Mr. Close, and also the retraction, could have failed to regard the latter as an adequate and forthright withdrawal of any implied charges against the good character and motives of plaintiff.

[9] Plaintiff insists it was an abuse of discretion to refuse him another opportunity to amend. We think not. The weakness of his complaint lay in his failure to allege special damage. He had one opportunity to add that allegation and failed to do so. His argument upon this point is silent as to any respect in which he could have amended to state a cause of action.

The judgments are affirmed.

WOOD and VALLÉE, JJ., concur.

95 Cal.App.2d 520

JAEGER v. CHAPMAN et al.

No. 14148.

District Court of Appeal, First District,
Division 1, California.

Jan. 11, 1950.

Lillian Jaeger sued Meriel Whitman Chapman, R. J. Chapman and Harry Miles for injuries sustained in an automobile collision.

A judgment was entered in the Superior Court, County of Santa Clara, John D. Foley, J., in favor of the defendants Chapman and against the defendant Miles, and the defendant Miles alone appealed.

The District Court of Appeal, Peters, P. J., affirmed the judgment on the ground that trial court did not err in refusing to give the two instructions proffered by defendant Miles.

1. Automobiles ⚷201(10)

The words "unavoidable" and "inevitable" in describing automobile accident denotes that the accident may have occurred without being caused by negligence of anyone, and not that accident could not have been avoided by exercise of exceptional foresight, skill or caution.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Inevitable" and "Unavoidable".

2. Trial ⚷260(8)

In action for injuries sustained by automobile occupant brought against both driver of automobile in which she was riding and owner and driver of other automobile, where all elements of liability of owner of automobile in which plaintiff was riding were covered by instructions given, refusal of his proffered instruction that he could not be held liable if injuries were result of unavoidable accident was not error, since plea of unavoidable accident was simply another way of urging that defendant was not negligent.

3. Trial ⚷261

Where requested instruction is in part inaccurate, misleading or incomplete, trial court is not required to modify it or to give others in lieu of it as long as jury is properly instructed as to law of the case.

4. Trial ⚷261

Where general subject matter of statute prohibiting reduced speed that impedes normal flow of traffic unless necessary for safe operation was adequately covered in instructions given, and instruction thereon proffered by driver of automobile in which plaintiff was riding was in part accurate and misleading, refusal to give or modify the proffered instruction was not error. Vehicle Code, §§ 514, 544.

◆

Alexander, Bacon & Mundhenk, San Francisco, Herbert Chamberlin, San Francisco, attorneys for defendant and appellant.

John H. Machado, San Jose, attorney for plaintiff and respondent.

PETERS, Presiding Justice.

At about 4:30 p. m. on a clear day on Highway 101, about four miles north of Gilroy in Santa Clara County, the automobile being driven south on that highway by defendant-appellant Harry Miles, and in which plaintiff-respondent Lillian Jaeger was riding as a passenger, crashed into the back of an automobile occupied by the Chapmans, which was also proceeding south on that highway, and being driven by Meriel Chapman. Respondent was seriously injured. She brought this action against Miles and the Chapmans. The jury found in favor of the Chapmans, but brought in a verdict against Miles. From the judgment based on the verdict Miles appeals, making as his sole contention the point that the trial court committed prejudicial error in refusing to give two instructions proffered by him.

At the scene of the accident Highway 101 has two northbound and two southbound lanes. Masten Avenue comes into the highway from the east. Southbound traffic on the highway gained access to Masten Avenue by turning left across the highway at the end of a macadam and gravel barrier which was sixty-six feet long, eight feet wide and fifteen inches high, and which divided the north and southbound traffic lanes.

Both vehicles were proceeding south on the highway, with the Chapmans' car ahead of the Miles' automobile. About 300 yards north of Masten Avenue Mrs. Chapman drove from the slow or righthand southbound lane to the fast or left southbound lane, intending to turn left at Masten Avenue. There is ample and substantial evidence that she extended her left arm as a signal to cars behind her that she intended to turn left. Mrs. Chapman testified that just before making the turn she slowed down from about forty miles an hour to about ten or fifteen miles per hour.

Appellant Miles was traveling in the fast or left southbound lane behind the Chapmans' car. He testified that he was going about 45 miles per hour; that when the Chapmans' car was still north of the Masten Avenue intersection it suddenly stopped on the highway; that he applied his brakes and went into a skid but was unable to stop before hitting the Chapmans' car. The accident happened just about at the end of the barrier where a left turn from the southbound lane of the highway would be taken.

The Chapmans denied that they were negligent and, in addition, alleged that the accident was proximately caused by the negligence of Miles. The appellant Miles denied that he had been negligent and alleged "that insofar as he is concerned the accident complained of was unavoidable, and alleges that the injuries and damages complained of, if any, were due to and caused by an unavoidable accident."

Appellant offered and the trial court refused to give the following instruction: "In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote that an accident occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still no one may be held liable for injury resulting from it."

[1] The words "unavoidable" and "inevitable" simply denote that the accident may have occurred without being caused by the negligence of anyone. Wilkerson v. Brown, 84 Cal.App.2d 401, 190 P.2d 958; Temple v. De Mirjian, 51 Cal.App.2d 559, 125 P.2d 544. Although the proffered instruction contained a correct statement of law, it merely states, in a specialized fashion, the defense that a defendant is not liable if he was not negligent. The jury was fully, correctly and fairly instructed on the general rules of liability for negligence. The court gave the following two instructions: "I instruct you that you cannot award any damages against defendant Harry Miles unless you find that said defendant was negligent, and unless you find that negligence on his part was a proximate cause of the accident. In determining whether or not defendant Harry Miles was negligent it is your duty to determine what a person of ordinary prudence would have done under the same or similar circumstances." The mere fact that the automobile that was driven by Mr. Miles came in contact with Mrs. Chapman's automobile does not in itself establish any liability on the part of Mr. Miles; and if Mr. Miles was not careless or negligent in any respect in driving his automobile, then no damages should be awarded against him."

The court also instructed that the jury should not award any damages against Miles if he was free from fault and was not careless or negligent, and that the burden to prove that Miles was negligent and that such negligence, if proved, was a proximate cause of the accident was on the plaintiff. In addition, the court instructed that: "A person who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from the presence of imminent danger to himself or to others, is not expected, nor required, to use the same judgment and prudence that is required of him, in the exercise of ordinary care, in calmer and more deliberate moments. His duty is to exercise only the care that an ordinarily prudent person would exercise in same situation. If at that moment, he does what appears to be the best thing to do, and if his choice and manner of action are the same as might have been followed by any ordinarily prudent person under the same conditions, he does all the law requires of him, although, in the light of after events, it should appear that a different course would have been better and safer."

[2] Thus the jury was fully instructed that the defendant was not liable if he was not negligent and if such negligence was not a proximate cause of the accident. While it would not have been error to have given such an instruction, it was not error to refuse to give it where all elements of defendant's liability were covered by other instructions. The defendant is not entitled to have his defense overemphasized and cannot complain that his defense is not stated in a particular way, as long as the defense is adequately and fairly covered. In Guay v. American President Lines, 81 Cal.App.2d 495, at pages 513–514, 184 P.2d 539, at page 549, this court disposed of similar contention as follows: "Objection is made to the trial court's failure to give a proffered instruction that defendant was not liable if the injuries were the result of unavoidable accident. In Stein v. United Railroads, 159 Cal. 368, at page 373, 113 P. 663, 665, it was held not error to refuse to instruct on unavoidable accident, because 'A juror would know that such was the rule without instruction and it would seem absurd to burden the record with a formal statement of a truth so self-evident.' In Gunter v. Claggett, 65 Cal.App.2d 636, at page 642, 151 P.2d 271, 274, the court said that '* * * unavoidable accident is simply another way of urging that defendant was not negligent. The jury has found, and the finding is supported, that defendant was negligent. No prejudicial error occurred in failing to instruct on this issue.' The jury was fully and fairly instructed on the general rules of liability for negligence. It has impliedly found that defendant's negligence solely and proximately caused the accident. Such finding is supported by the evidence, and the permissible inferences therefrom. Under these circumstances no error was committed in failing to instruct on unavoidable accident."

The other instruction, offered by appellant and refused by the trial court, which appellant claims should have been given, reads as follows:

"You are instructed that Section 514 of the Vehicle Code of the State of California in force and effect at the time of the happening of this accident provided as follows:

"'Minimum Speed Law. No person shall drive upon a highway at such a slow speed as to impede or block the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or because upon a grade or when the vehicle is a motor truck or motor truck towing another vehicle necessarily or in compliance with law proceeding at reduced speed.'

"If you find that the driver of an automobile traveling in the same direction in front of the Chrysler car driven by Mr. Miles, violated the foregoing provision of the Vehicle Code by driving at such a slow speed as to impede or block the normal and reasonable movement of traffic, and that such violation was the sole proximate cause of the accident, then Mr. Miles is not responsible for the accident, and no damages should be awarded against him."

It will be noted that the code section prohibits reduced speed that impedes the normal flow of traffic "except when reduced speed is necessary for safe operation." The last paragraph of the proffered instruction, which is in effect a formula instruction, states that if the jury finds that Mrs. Chapman "violated" the code section "by driving at such a slow speed as to impede or block the normal and reasonable movement of traffic," and that such was the proximate cause of the accident, no damages should be awarded against appellant. The proffered instruction, in its formula portion, completely omits the limitation contained in the code section. Thus, if given, it would have misled the jury by giving the impression that if Mrs. Chapman drove so slowly as to impede traffic, and that such slow movement proximately caused the accident, Miles was not responsible regardless of why Mrs. Chapman slowed down. Of course, under the statute, it is for the jury to determine in each case whether reduction of speed was "necessary for safe operation", and if it was, the section has not been violated. Thus, to say the least, the offered instruction was inaccurate, and certainly incomplete.

[3] It is well settled that where a requested instruction is in part inaccurate, misleading or incomplete the trial court is not required to modify it or is under no duty to give others in lieu of it as long as the jury is properly instructed as to the law of the case. See many cases collected, 24 Cal.Jur. 802, § 77. Generally speaking, no duty rests on the trial court to reframe a proposed incorrect instruction so as to make it correctly state the law. Jones v. Bayley, 49 Cal.App.2d 647, 122 P.2d 293. Of course, although misleading, inaccurate or incomplete instructions need not be modified, it is incumbent on the trial court to give instructions on all vital issues in the case so that the jury will have a full and complete understanding of the law applicable to the facts, and if necessary to modify incomplete instructions or to give ones drafted by the court. Herbert v. Lankershim, 9 Cal.2d 409, 482, 71 P.2d 220. But this qualification of the rule has no application to this case. Here the jury was fully instructed on every vital issue involved. The main theory of both the Chapmans and Miles in their defense of this case was that the accident was proximately caused by the other. The basic question involved was whether Mrs. Chapman was negligent in slowing down or in stopping. Evidence was introduced on that issue by all the parties. While the court did not specifically instruct on section 514 of the Vehicle Code and while such a correct instruction would have been appropriate, the general subject matter of that section was adequately covered by instructions referring to related sections which more directly involved the specific problem presented. Thus the court instructed as follows:

"I instruct you that the violation of any of the provisions of the Motor Vehicle Code which I am about to read to you, unless justifiable or excusable, constitutes negligence in and of itself and as a matter of law.

"If, therefore, you should find from the evidence that the defendants or either of them violated any one or more of the provisions of the Motor Vehicle Code which I am about to read to you, and that such violation, if any, was neither excusable or justifiable and was a proximate cause of the accident, you must conclude that the defendant violating such provisions or provision was negligent. * * *

"544. Turning and stopping movements and required signals.

"(a) No person shall turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided herein in the event any other vehicle may be affected by such movement.

"(b) Any signal of intention to turn right or left shall be given continuously during the last 50 feet traveled by the vehicle before turning.

"(c) No person shall stop or suddenly decrease the speed of a vehicle on a highway without first giving an appropriate signal to the driver of any vehicle immediately to the rear when there is opportunity to give such signal." This section was read, in toto, to the jury in another place in the instructions.

[4] In addition, the jury was fully instructed that if they should find that the accident was proximately caused solely by the negligence of Mrs. Chapman then "you cannot return a verdict against defendant Harry Miles regardless of the fact that plaintiff was a passenger in the automobile of said Harry Miles." Thus the general subject matter of section 514 was adequately covered. Under the circumstances it was not error to refuse to give or to modify the proffered instruction.

The judgment is affirmed.

WARD and BRAY, JJ., concur.

95 Cal.App.2d 536

In re KNAPP'S ESTATE.

GODLEY v. STATE.

Civ. 17350.

District Court of Appeal, Second District,
Division 1, California.
Jan. 11, 1950.

In the matter of the estate of George Owen Knapp, deceased.

From an order fixing an inheritance tax, Frederick A. Godley, executor of the estate, appealed.

The State moved to augment the record on appeal by adding a copy of decedent's will.

The District Court of Appeal, per curiam, denied the motion because of the parties' stipulation.

Appeal and error 🔑659(3)

Where parties stipulated that certain facts were true and should constitute entire evidence for purpose of determining issues raised by inheritance tax appraiser's report and executor's objection thereto, the state's motion to augment record on executor's appeal from order fixing inheritance tax by adding copy of decedent's will, never offered to trial court, must be denied.

Heaney, Price, Postel & Parma, Santa Barbara, for appellant.

James W. Hickey, Raymond C. LaNoue, Sacramento, and Morton L. Barker, Los Angeles, for respondent.

PER CURIAM.

The executor of the Estate of George Owen Knapp, Deceased, filed objection to the report of the Inheritance Tax Appraiser and was overruled in the trial court. From the order fixing inheritance tax, the executor appealed. Thereupon, respondent moved to augment the record on appeal by adding a copy of the will of George Owen Knapp. Appellant contends that the will was never offered to the trial court and that the matter was submitted solely upon a written stipulation of facts. The judge who tried the case states that the will was not considered in fixing the tax.

The file has been gone over, with reference to the motion to augment the record.

The stipulation is controlling:

"The following facts are stipulated to be true and proof thereof is hereby waived *and the same shall constitute the entire evidence and proof for the purpose of determining the issues* raised by the report of the Inheritance Tax Appraiser and the objection of said Executor thereto. (Emphasis added.)

Therefore, the motion to augment the record by bringing up the will of the decedent is denied.

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95 Cal.App.2d 559

MILLS et ux. v. SCHULBA et al.

Civ. 13965.

District Court of Appeal, First District,
Division 2, California.
Jan. 12, 1950.

Andrew Perry Mills and wife brought action against Anthony Schulba and Grace Schulba for reformation of a deed which it was alleged omitted, because of mistake of attorney employed by parties to draw up the deed, one of two lots intended to be sold.

The Superior Court of San Mateo County, Andrew R. Schottky, J., rendered judgment for the plaintiffs, and the defendants appealed. On the death of Anthony Schulba, Grace Schulba, as executrix of the last will of Anthony Schulba, deceased, was substituted for Anthony Schulba.

The District Court of Appeal, Goodell, J., held that amended complaint stated a cause of action, that evidence was sufficient to support findings and judgment, and that plaintiffs' remedy was reformation rather than rescission, and that plaintiffs were not precluded from relief because of their alleged negligence.

Judgment affirmed.

1. Pleading ⚷34(7)

In absence of a demurrer, great liberality will be indulged in order to sustain faulty complaints in actions to reform contracts.

2. Pleading ⚷34(7)

Where defendants did not demur to complaint in action for reformation of a deed, only inquiry to be made by District Court of Appeal on appeal by defendants from judgment for plaintiff was whether complaint was sufficient as against a general demurrer.

3. Reformation of Instruments ⚷17(2)

The mistake of a draftsman is a good ground for reformation of an instrument which does not truly express the intention of the parties.

4. Pleading ⚷34(7)

Where amended complaint in action for reformation of a deed did not contain deed but referred to a copy thereof annexed to original complaint and thus incorporated it, and defendants in their answer referred to deed annexed to original complaint, and defendants did not demur, defendants could not complain because amended complaint did not contain the deed.

5. Reformation of Instruments ⚷36(1)

Complaint alleging that vendors and purchasers agreed to purchase of adjoining lots, but that because of mistake of an attorney jointly employed by parties to prepare the deed, deed conveyed only one of lots, was sufficient to state a cause of action for reformation of deed. Civ.Code, § 3399.

6. Reformation of Instruments ⚷45(1)

In reformation cases, the evidence must be clear and convincing or something more than a preponderance.

7. Reformation of Instruments ⚷45(5)

In action to reform a deed which allegedly, because of mistake of attorney employed by the parties to draw up the deed, conveyed only one lot when parties intended to convey two lots, evidence sustained finding that mistake had been made in execution of deed, entitling purchasers to reformation.

8. Appeal and error ⚷1011(1)

Decision of trial court on conflicts in the evidence was conclusive on District Court of Appeal.

9. Reformation of Instruments ⚷25

Where vendors and purchasers employed an attorney to draw up deed which was intended to cover two adjoining lots, and description of realty in deed was by metes and bounds and took up 22 lines of single spaced typewriting, failure of purchasers to discover that deed erroneously omitted one of the lots, was not such negligence as would preclude purchasers from having deed reformed, though deed described frontage as less than half the total frontage.

10. Reformation of Instruments ⚷1

Where purchasers and vendors intended that two adjoining lots would be sold, but attorney employed by parties mistakenly omitted one of lots from description in deed, purchasers' remedy was by reformation rather than rescission.

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Millington, Dell 'Ergo, Weeks & Morrissey, Redwood City, for appellants.

Bullock, Wagstaffe & Daba, Redwood City, for respondents.

GOODELL, Justice.

This appeal was taken from a judgment which decreed the reformation of a deed. The appellant Anthony Schulba died after the appeal was taken and his executrix was substituted.

Anthony and Grace Schulba owned two lots with a frontage of 73 feet 5 inches on Mission Street in Daly City. One, of irregular shape, with a frontage of 33 feet 5 inches, has a two-story building thereon, the lower part of which is a shop and the upper part a dwelling. The other adjoins, with a frontage of 40 feet and a depth of about 100 feet, and was unimproved except for a fence, shed and garage.

In March, 1944, respondents, acting through a broker, made a written offer to buy both lots for $10,000. Appellants rejected the offer but said they would sell for $10,500, which meant $10,000 net.

In July, 1944, the parties got together without a broker and orally agreed on $10,000 net. The down payment was made, a deed recorded, a mortgage given, and respondents went into possession of both lots about August 22, 1944.

Some 19 months later it was discovered that the deed described only the improved property (the 33 ft. 5 in. lot) and omitted all reference to the unimproved 40 foot lot. This suit was promptly brought.

The court found "that both parties understood that both parcels were to be included in the transaction and were covered by the deed, and that they were not both included because of a mutual mistake of the parties."

Appellants' four points are (1st) that the amended complaint does not state a cause of action; (2nd) that the evidence is insufficient to support the findings and judgment; (3rd) that plaintiffs' remedy, if any, is rescission, not reformation, and (4th) that plaintiffs are precluded from relief by their own negligence.

[1, 2] Appellants' attack on the amended complaint comes at a late date, for they did not demur. "In the absence of a demurrer, great liberality has been indulged in order to sustain faulty complaints in actions to reform contracts", Auerbach v. Healy, 174 Cal. 60, 63, 161 P. 1157, 1158, and our only inquiry is whether the pleading is sufficient as against a general demurrer.

In the amended complaint it is alleged that defendants, owners of both lots, agreed to sell them to plaintiffs for $10,000; that the parties jointly employed an attorney (naming him) for the purpose of preparing the necessary deed and mortgage and of securing title searches and title insurance; that on or about August 22, 1944, defendants delivered to plaintiffs a "joint tenancy deed, a copy of which is attached to the original complaint * * * as exhibit A, and is incorporated herein as though repeated and repleaded in full"; that such deed did not convey the two lots "and that the failure of said deed to convey the two said lots is the result of a mistake on the part of [the attorney] acting for and in behalf of all of the parties hereto and that it was the intention of the parties hereto that said deed should convey * * * title in fee simple in the two said lots * * * That both the plaintiffs and the defendants herein relied upon [the attorney] to so draw the deed as to convey title in fee simple * * *."

[3] Our courts have repeatedly held that the mistake of a draftsman is a good ground for the reformation of an instrument which does not truly express the intention of the parties. 22 Cal.Jur. p. 719 and cases cited; See, also, Merkle v. Merkle, 85 Cal.App. 87, 107–108, 258 P. 969. The complaint not only alleges such mistake but goes further and alleges that the draftsman was "jointly employed", the theory being, apparently, that *his* mistake was the mutual mistake of the principals who placed reliance in him.

The mistake of an attorney chosen by both sides to effect a transfer of title is not unlike that of a surveyor chosen by both sides to run a line, who runs it in the wrong place resulting in an erroneous description in the deed. Such a case was Breen v. Donnelly, 74 Cal. 301, 15 P. 845, cited in Hart v. Walton, 9 Cal.App. 502, 508, 99 P. 719, where reformation was decreed.

In 45 Am.Jur. pp. 618–619 this is said: "A mutual mistake of their agents is not necessarily a mistake of the parties. Undoubtedly, it would be * * * where the mistake was made by a scrivener who acted as common agent of both parties in drafting the instrument; * * *." See, also, 26 A.L.R. 506; Meek v. Hurst, 1909, 223 Mo. 688, 122 S.W. 1022, 1024, 135 Am.St.Rep. 531, and Kobylinski v. Szeliga, 307 Mich. 306, 11 N.W.2d 899.

[4] The amended complaint did not contain the deed but referred to the copy thereof annexed to the original complaint and thus incorporated it. Appellants cannot complain of this since they not only did not demur, but in their answer they re-

ferred to the same exhibit attached to the superseded pleading. Thus there was an aider, 21 Cal.Jur. p. 277, and both sides went to trial assuming that the deed was properly pleaded.

[5] The amended complaint pleads a mutual mistake by alleging the error of the attorney "jointly employed", and its allegations bring the case within section 3399, Civil Code. This conclusion is supported by Seegelken v. Corey, 93 Cal. 92, 95, 28 P. 849, and Robertson v. Melville, 60 Cal. App. 354, 358–359, 212 P. 723, as well as by cases already cited.

Appellants' second point is that the evidence is insufficient to support the findings and judgment.

There are but few conflicts in this record.

It was established by documentary evidence that in the first negotiations an offer was made by respondents to purchase both lots for $10,000. Those negotiations broke down on the difference in price between $10,000 gross and $10,000 net. The final negotiations which were oral, informal, and without the aid of a broker, eventuated in an agreement on $10,000 net, precisely the figure for which appellants had originally held out. These undisputed facts and the coincidence of figures were persuasive evidence that the property on which the parties came to terms in July was identical with that as to which they had negotiated in March namely, *both lots.*

After the attorney had agreed to represent respondents as well as appellants, Mills gave him, according to both respondents, the document containing the rejected offer, *which referred to both lots,* saying, "This is the property I am buying." The attorney denied this, testifying that he never saw that document until the trial. Respondents testified that on the same occasion the attorney replied that the document did not contain "a complete description of the property, which I will get from Mr. Schulba and have a title search on this property." It is undisputed that he obtained from Schulba an old deed but it described only the improved property. That description became the basis for the title search, the policy, the deed and the mortgage.

The following circumstances attending the transfer are persuasive evidence that both parties intended the unimproved lot to be included in the deed. (1) Possession of that lot was given to respondents in August, 1944, at the time the improved property was turned over, and remained unchallenged until March 18, 1946. (2) The key to the gate leading into it was handed by Schulba to the Mills' son with the statement "It is not my key." (3) For almost two years appellants had rented the garage on the unimproved lot to the Campbells and in August after the transfer, when they tendered the rent to Schulba, he told them, according to their testimony, to pay it to Mills as the lot had been sold to him. They did so thereafter. Indeed Schulba admitted that he told Campbell "From now on * * * pay the rent to Mr. Mills." (4) When Schulba removed his trucks and other property from the lot after the sale he left a power saw with Mills' permission, and later when he returned to get it he told Mills "This is all, everything is yours now." (5) When tax time came around in 1945 after the sale, the tax bills for *both lots* were sent to appellants, and Schulba turned them over to Mills, saying according to Mills' testimony, "This is your property now, and you must pay the taxes on it", and respondents paid them.

Schulba testified that he intended to sell, and sold, only the improved property. The only explanation he gave for turning over the key to the gate was that Mills asked for it, and his explanation of respondents' possession of the vacant lot—which ran unchallenged for 19 months—was that he had no objection to respondents using the lot. He gave no satisfactory explanation for his direction to pay the garage rent to Mills. He denied giving respondents the 1945 tax bill for the unimproved lot but added "May be if I did it was a mistake." At any rate such explanations as he did give respecting these inconsistent acts did not convince the trial court.

When the tax bills were sent out in the spring of 1946, the bill for the unimproved lot was mailed to appellants at their old address and respondents readdressed the envelope to appellants' new home in Redwood City. Thereafter the attorney in question ascertained at the Assessor's office that record title to the vacant lot still stood in appellants' names. On March 18, 1946, acting then on behalf of appellants, he wrote respondents demanding possession of the lot or $40 monthly rental therefor. Respondents testified that this was the first notice they had that both lots had not been included in the deed. It is readily understandable that the trial court could have concluded that appellants made the same discovery only when they received the 1946 tax bill and the attorney checked the records.

[6-8] In reformation cases the evidence must be clear and convincing "or something more than a preponderance". Moore v. Vandermast, Inc., 19 Cal.2d 94, 96–97, 119 P.2d 129, 130. It is not difficult to see why the trial court deemed the evidence sufficient to meet that strict test. The conflicts are but few, and the decision of the trial court upon them is conclusive upon this court. Sullivan v. Moorhead, 99 Cal. 157, 161, 33 P. 796; see, also, California Packing Corp. v. Larsen, 187 Cal. 610, 613, 203 P. 102.

Appellants' fourth contention is that plaintiffs are precluded from relief because of their negligence in failing to read the title papers with sufficient care and attention to discover the error.

[9] Usually such claimed negligence is the failure to read some provision, condition, covenant or reservation contained in a writing. Here, however, the claimed negligence is Mills' failure to discover an error in a legal description of real property. In determining the question of fact whether or not the failure was excusable the trial judge presumably gave consideration to the peculiar nature of the words and figures which are supposed to have been read. The description is one by metes and bounds, of an irregularly shaped piece of land, and it takes up 22 lines of single-spaced typewriting. The difference is obvious between the act of reading such technical matter, with its language respecting lines and corners and its references to maps, and the books and pages of maps, on the one hand, and the act of reading a provision, condition, covenant or reservation, on the other. Appellants argue that Mills should have caught the error in this description since the frontage is given therein as 33 feet 5 inches, which is less than half the total frontage. They argue that he is an experienced businessman. He admitted his familiarity with business in so far as it concerns personal property, but disclaimed familiarity with real estate transactions or legal descriptions. Under cross-examination it developed that he had had only one such transaction before, and then everything was handled by a building and loan company. While Mills might be a businessman, he is neither a lawyer nor a surveyor, and it is an admitted fact that both parties relied on the attorney, who previously for about two years had been escrow officer of a title company, and presumably an expert. All these questions were for the trier of fact who presumably concluded that if Mills was careless in not detecting the error in description his inadvertence, as said in Los Angeles & R. R. Co. v. New Liverpool Salt Co., 150 Cal. 21, 28, 87 P. 1029, 1031, was "of a character which will sometimes occur in the conduct of men of prudence and caution." In other words, to paraphrase Burt v. Los Angeles Olive Growers Ass'n, 175 Cal. 668, 675–676, 166 P. 993, 996, the cause of his failure was satisfactorily explained to the court, which determined "that the explanation or excuse of the failure relieves from the charge of the neglect of a legal duty, within the meaning of section 1577 of the Civil Code."

In the New Liverpool Salt case, supra, 150 Cal. at page 27, 87 P. at page 1031, the court says: "It has been frequently decided that the mere failure of a party to read an instrument with sufficient attention to perceive an error or defect in its contents will not prevent its reformation at the instance of the party who executes it thus carelessly." That case has been followed in Travelli v. Bowman, 150 Cal. 587, 591, 89 P. 347, California Packing Corp. v. Larsen, 187 Cal. 610, 614, 203 P. 102, supra, and Hanlon v. Western Loan & Bldg. Co., 46 Cal.App.2d 580, 597–598, 116 P.2d 465.

There is no basis for overturning the trial court's implied finding that respondents were not negligent, or, if they were, that such negligence was excusable.

[10] Appellants' remaining contention (their third point) is that respondents' remedy, if any, is by rescission and not reformation. If respondents are entitled to reformation they would certainly be denied a complete equitable remedy if relegated to rescission. We are satisfied, as appears from the discussion of the three preceding points, that respondents have pleaded and proved a case clearly entitling them to a reformation of the deed, hence there is no point in discussing the cases cited under the present head.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

95 Cal.App.2d 594

MITCHELL v. WARREN, Governor.

Civ. 4037.

District Court of Appeal, Fourth District, California.

Jan. 16, 1950.

Oral L. Mitchell, as a taxpayer and legally qualified voter of an assembly district, filed a petition against Earl Warren, as Governor of the State of California, for a writ of mandate compelling respondent to call an election to select a successor to an assemblyman who died during his term of office.

The District Court of Appeal, Griffin, Acting P. J., held that the question raised by pleading was moot and not required to be decided.

Proceeding dismissed.

Mandamus 🔑16(1)

Where Governor called election to select a successor to an assembly man who died during his term of office, before decision was to be filed in proceeding on petition for writ of mandate to compel Governor to call such election, the proceeding would be dismissed as presenting a moot question.

◆

Harold A. Parichan, Fresno, for petitioner.

Fred N. Howser, Attorney General, Leonard M. Friedman, Deputy Attorney General, for respondent.

GRIFFIN, Acting Presiding Justice.

Petitioner, Oral L. Mitchell, as a taxpayer and legally qualified voter of the 35th assembly district, instituted this proceeding to compel the Honorable Earl Warren, as Governor of the State of California, to call an election in that district for the purpose of electing a successor to the late Samuel L. Heisinger. Heisinger was duly elected assemblyman of the 35th district in 1948, and died on September 21, 1949, during his term of office. This office has been vacant ever since said date and no election has been called by the Governor to fill said vacancy.

It is alleged in the verified petition and amended verified petition, that it was mandatory, under Article IV, sec. 12, and Art. 1, sec. 22 of the Constitution, and Sec. 1773 of the Government Code, for the Governor to "at once" issue a writ of election to fill such vacancy. In return to the order to show cause, the attorney general alleges that under the law stated the time of the issuance of a writ of election to fill a vacancy in the legislature is discretionary with the Governor, and cites several cases in support thereof, such as Putnam v. Norblad, 134 Or. 433, 293 P. 940; State ex rel. Cromelein v. Boyd, 36 Neb. 181, 54 N.W. 252, 19 L.R.A. 227; and People ex rel. Bacon v. Cullom, 100 Ill. 472.

After hearing on the order to show cause and the factual questions were properly at issue, the petition was submitted for decision. A few hours before the decision was to be filed, the court was notified that the Governor had called the election in that district. It therefore appears that the question raised by the pleadings is now moot.

On motion of petitioner, the proceeding is dismissed. Weiss v. City of Los Angeles, 190 Cal. 576, 213 P. 979; Atkins v. Hughes, 208 Cal. 508, 509, 282 P. 787.

MUSSELL, J., concurs.

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95 Cal.App.2d 566

MUSCOY MUT. WATER CO. NO. 1 v. ENLOE et al.

Civ. 3866.

District Court of Appeal, Fourth District, California.

Jan. 12, 1950.

Muscoy Mutual Water Company No. 1 sued L. O. Enloe for an injunction to enjoin the defendant from interfering with its distribution system, pipe lines, gate valves and distribution of waters to shareholders. The defendant filed a cross-complaint against the plaintiff and Carl Jensen and others to restrain the plaintiff from shutting off his water supply disconnecting his pipe lines to recover damages to his property and to crops growing thereon as result of refusal to deliver water to him.

A judgment for the plaintiff was entered in the Superior Court of San Bernardino County, Martin J. Coughlin, J., and the defendant appealed.

The District Court of Appeal, Mussell, J., affirmed the judgment on ground that evidence authorized issuance of injunction prayed for by plaintiff and that evidence failed to establish that plaintiff was estopped to deny defendant's status as a stockholder.

1. Waters and water courses ⚷264

Evidence that plaintiff water company was organized to supply water "to and for its stockholders only", that defendant made no reply to plaintiff's request for information "by what right he had received or was receiving water from said corporation," that plaintiff after serving written notice closed gate valve permitting water to flow into defendant's pipe lines, and thereafter defendant opened gate valve and constructed a concrete construction preventing plaintiff from gaining access to gate valve, was sufficient to entitle plaintiff to an injunction enjoining defendant from interfering with plaintiff's distribution system.

2. Appeal and error ⚷1010(1)

Where there was substantial evidence to support conclusions reached by trial court, they will not be disturbed on appeal.

3. Waters and water courses ⚷252

Evidence failed to establish that plaintiff water company, which was organized for purpose of supplying water "to and for its stockholders only", was estopped from denying defendant's status as a stockholder and his right to receive water because it had furnished water to him without objection for period of nearly two years and had also furnished water to others who were not shareholders during such period. Corporations Code, § 103; Code Civ.Proc. § 1962, subd. 3.

Taylor F. Peterson and P. E. Bingman, San Bernardino, for appellant.

Wilson & Wilson, San Bernardino, for respondent.

MUSSELL, Justice.

In this action for an injunction, the plaintiff, a mutual water company, obtained a judgment enjoining the defendant from interfering with its distribution system, pipe lines, gate valves and its distribution of water to shareholders.

The defendant, by virtue of an agreement to purchase, took possession of approximately two acres of land in the area served by the company on the 15th day of June, 1945. Defendant's agreement to purchase the land also included a contract to buy two shares of stock then owned by the vendor and his wife. Plaintiff furnished water to defendant until May 5, 1947, on which date the company ceased to furnish water to him and to others who were not shareholders and closed the gate valve through which defendant had theretofore obtained water. On June 6, 1947, approximately thirty-one days later, the defendant constructed a concrete box over the gate valve, turned the water on and has received water through the company's system continuously ever since.

The trial court found that plaintiff company was organized for the purpose of supplying water "to and for its stockholders only"; that on December 14, 1945, plaintiff and its shareholders adopted amended by-laws which provide that "no water belonging to said corporation shall be furnished or sold except to the shareholders thereof and that no stockholder shall sell any water furnished or delivered to or received by him from said corporation to any other person or for use upon any other premises than those specified in his application for such water;" that on May 31, 1946, plaintiff, in writing, requested defendant to inform plaintiff "by what right he had theretofore received and was then receiving water from said corporation," as well as to inform plaintiff "respecting the number of shares of said corporation issued to him" to which request the defendant made no reply; that although requested so to do defendant since February, 1946, refused to inform plaintiff "whether any shares thereof had been issued to him" or to inform plaintiff "by what right he had received or was receiving water from said corporation;" that on the 12th day of March, 1947, plaintiff served upon defendant a written notice that defendant "did not appear on the records thereof to be a shareholder and that upon the expiration of thirty days from the date thereof said corporation would discontinue the delivery of water" unless defendant "became a shareholder of said corporation prior to said expiration date;" that contemporaneously with said notice plaintiff delivered to defendant a written notice "to be executed by a shareholder of said corporation authorizing said corporation on behalf of such signing shareholder to deliver water to the defendant;" that defendant was not a shareholder on March 12, 1947, and did not become a shareholder until August 1, 1947; that defendant did not within thirty days after March 12, 1947, become a shareholder nor deliver to plaintiff any "authorization in writing by any shareholder to deliver the water of the latter" to defendant; that on April 26, 1947, plaintiff served upon defendant a notice in writing that defendant "was not a shareholder of said corporation;" that he had been requested to present proof that he "was a shareholder thereof or the nominee of a shareholder thereof, which he failed to do," and that on May 5, 1947, the plaintiff "would close all valves and sever all pipe lines through and by means of which water had theretofore been permitted to flow from the pipe lines of said corporation into the pipe lines" of defendant; that on May 5, 1947, the plaintiff closed the said gate valve; that on June 6, 1947, the defendant "turned on said gate valve and thereby permitted water to flow from the pipe lines of said corporation into the pipe lines of defendant" and constructed "over said gate valve a concrete obstruction and thereby prevented and at all times thereafter has prevented said corporation from gaining access to said gate valve or from stopping the flow of water from its pipe lines into the pipe lines" of defendant; that on June 7, 1947, the defendant, in writing, informed plaintiff that he "had turned on said gate valve and constructed said concrete obstruction;" that on June 9, 1947, the defendant presented to plaintiff a certificate for two shares of its stock endorsed with a transfer thereof to defendant; that said two shares were then encumbered by unpaid assessments and unpaid tolls and charges; that the by-laws of plaintiff forbid the transfer of shares until all assessments, tolls and charges are paid; that defendant paid such tolls and charges and on August 1, 1947, upon such payment, the two shares were transferred on the records to defendant; that defendant was not, prior to August 1, 1947, a shareholder "nor authorized nor entitled to receive any water from said corporation."

[1, 2] The facts as found, if true, entitle plaintiff to the injunctive relief sought. 26 Cal.Jur. 528, Sections 777, 778; Allen v. Stowell, 145 Cal. 666, 668, 79 P. 371, 68 L.R.A. 223, 104 Am.St.Rep. 80; Furtado v. Taylor, 86 Cal.App.2d 346, 354, 194 P.2d 770; Zierath v. McCann, 20 Cal.App. 561, 129 P. 808. Where, as here, there was substantial evidence to support the conclusions reached by the trial court, they will not be disturbed on appeal. Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Dillard v. McKnight, 34 Cal.2d 209, 209 P.2d 387.

[3] The defendant filed a cross-complaint in which he sought to restrain the water company from shutting off his water supply and disconnecting his pipe lines, for damages to his property and to crops growing thereon. He contends that the water company was estopped to deny his status as a stockholder and his right to receive water because it had furnished water to him without objection since June 15, 1945, and had in fact furnished water to others who were not shareholders during said period. He further contends that he was a stockholder by reason of his status as a purchaser of land within the district served by the plaintiff under a contract of sale which included a covenant to purchase stock in the plaintiff company.

The court found that "any damage sustained by the defendant and cross-complainant from lack of water * * * was proximately caused by the failure of the defendant and cross-complainant to cause the certificates of shares of stock of the plaintiff corporation which were delivered to him on the 29th day of April, 1947, to be transferred to him on the books of plaintiff corporation".

The court also found that defendant could have purchased a share of stock for $25 and that any damage which he alleges he sustained could have been minimized by either "purchasing a share of stock" or by causing a transfer on the books of the plaintiff "of the shares of stock assigned to him" on April 29, or by obtaining "written authorization" from Boone, his vendor, authorizing the delivery of water.

The evidence presented by the defendant to establish an estoppel is far from sufficient to accomplish that purpose. The corporation has never refused to deliver water to defendant if he would comply with its regulation by becoming a shareholder of record or obtain a written authorization of delivery of water to him. There is nothing unreasonable in these requirements as the articles of incorporation of plaintiff company limited delivery of water to "stockholders only". Defendant, to become a shareholder, was required to be a "holder of record of shares". Civil Code Section 278, now Section 103 of the Corporations Code.

On April 29, 1947, defendant obtained certificates evidencing two shares of the capital stock of the plaintiff company. These shares were subject to a lien for an unpaid assessment, water tolls and charges, and defendant did not deliver these certificates to plaintiff until June 9, 1947, and did not pay the assessment and charges until August 1st of that year, at which time the defendant obtained a certificate from the plaintiff showing his ownership of record of the two shares. By delivering the stock certificates representing these two shares to the plaintiff, charges paid, defendant could have become a shareholder and entitled to receive water as such. Apparently, defendant made no effort to secure a written authorization from his vendor under his purchase contract, who was a shareholder, for the delivery of water pursuant to the regulations of the plaintiff company. The record does not contain evidence of deception sufficient to create an estoppel. Verdugo Canyon Water Co. v. Verdugo, 152 Cal. 655, 674, 93 P. 1021; Code Civ.Proc. Sec. 1962, Sub. 3.

The judgment is affirmed.

GRIFFIN, Acting P. J., concurs.

95 Cal.App.2d 553

VAUGHN v. MONTGOMERY WARD & CO.

Civ. 14186.

District Court of Appeal, First District,
Division 1, California.
Jan. 12, 1950.

Action by Emma Vaughn against Montgomery Ward & Co. for injuries sustained in fall on floor of defendant's department store.

The Superior Court of San Mateo County, A. R. Cotton, J., entered judgment for plaintiff for $5,000 on verdict of jury, and the defendant appealed.

The District Court of Appeal, Peters, P. J., held that mere proof of fall and that there was a greasy substance on plaintiff's stocking, coat and skirt was insufficient as a matter of law to support implied finding that defendant was negligent in view of absence of evidence showing that there was any foreign substance on the floor, or that it was slippery, or that the floor had been recently oiled or waxed, and reversed the judgment.

1. Negligence 🔑32(1)

A department store owed to business guest the duty of exercising reasonable and ordinary care to keep the premises in a reasonably safe condition, but was not an insurer of the safety of such guest.

2. Negligence 🔑48

In order to impose liability on department store for injuries sustained by business guest it must be shown that a dangerous condition existed and that the department store knew or should have known of it.

3. Negligence 🔑121(1)

In action by business guest against department store for injuries sustained in fall on floor, burden rested upon the plaintiff to show the existence of a dangerous condition and that the defendant knew or should have known of it.

4. Negligence 🔑121(2)

No inference of negligence arises simply upon proof that a business guest fell on the floor of a department store.

5. Negligence 🔑134(5)

In action by business guest against department store for injuries sustained in fall on floor, mere proof that plaintiff fell and that there was a greasy substance on her stocking, coat and skirt was insufficient to support an implied finding that the department store was negligent in view of absence of proof that there was any foreign substance on the floor, or that the floors had been recently oiled or waxed, or that the floor was slippery.

6. Negligence 🔑50, 121(1, 5)

The owner of a department store must police and inspect the aisles but in an action by a business guest for injuries sustained in fall on floor, the minimum duty of plaintiff was to show that the aisles were in fact unsafe and that she fell because of that condition.

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Hagar, Crosby & Crosby, Oakland, Hoffmann & Draper, San Mateo, for appellant.

Cosgriff, Carr, McClellan & Ingersoll, Burlingame, for respondent.

PETERS, Presiding Justice.

Plaintiff slipped and fell in a store operated by Montgomery Ward & Co. in Burlingame and fractured her left kneecap. She brought this action alleging that "defendant was careless, reckless and negligent in that prior to the happening of the injuries herein complained of, defendant * * * placed upon the floor surface of its said store building an excess amount of oily, slippery, liquid substance or material and failed to use reasonable care in applying said oily, slippery substance or material to the surface of said floor, and failed to use reasonable or ordinary care in the maintenance of said floor after the application of said oily, slippery, liquid substance but allowed said floor to remain in a slippery, hazardous and unsafe condition." The case was tried before a jury and resulted in a $5000 verdict for plaintiff. From the judgment based thereon defendant appeals.

Plaintiff was employed in a cleaning establishment located a short distance from the Montgomery Ward store. She was a frequent business visitor in that store. On March 11, 1946, she entered the store during her lunch hour to cash a Montgomery

Ward check. She walked down one of the main aisles, bordered by lingerie and hosiery counters, and up to the cashier's office on the mezzanine floor, cashed her check, came back down the stairs, and proceeded along the same aisle by which she had entered. While so proceeding her right foot slipped and she fell heavily on her left knee. She was wearing shoes equipped with cuban heels. Neither then nor at any other time that day did she observe the condition of the floor, nor did she notice any foreign substance thereon. She did not testify that the floor was slippery. She was assisted to her feet by Mrs. Hill, a clerk, who told her to see the assistant manager, Cooper. Plaintiff testified that at the moment she was embarrassed and did not think she was hurt. She refused assistance and walked out of the store. In a few moments she realized her knee was hurt and returned to the store and asked Mrs. Hill the location of Cooper's office. She was directed to the mezzanine floor, and because Cooper was out to lunch, saw Robinette, the floor manager. He directed her to a company doctor. Plaintiff then left the store. On this second visit to the store in entering and leaving she passed down the same aisle where she had fallen, but did not observe the condition of the floor on either occasion.

Plaintiff then walked to her place of employment. One of plaintiff's coworkers, Mortensen by name, testified that he saw plaintiff come limping into the cleaning establishment, and that plaintiff showed him soiled spots on the hem of her coat and on her skirt and on the left knee of her stocking. These spots felt damp and oily to him. He also testified that he had not noticed the spots before plaintiff left for lunch, and did not know whether or not they were then present. Plaintiff testified as to these spots, and she also testified that they had not been on her clothes before she fell.

The floor on which plaintiff fell was made of maple—a hardwood. It was customarily treated with a preparation known as myco-sheen. Cooper, whose duties included the supervising of the periodic treatment of the floors, testified that myco-sheen is a resin solvent material containing no oil. Mrs. Hill testified that she had heard it had an oil base, but that she did not know from her own knowledge whether or not this was true. This substance was a liquid and was applied with mops and then dried off with dry mops. Cooper testified that the floors were never treated at any other time than on Saturday night, after closing hours; that the floors were gone over about once a month; that the counters were never moved when the floors were treated; that he could accurately ascertain the date the floors were last treated before the accident by the overtime records of his employees; that these records showed that prior to March 11, 1946, the floors had last been treated on February 23, 1946, some sixteen days before the accident. The plaintiff testified that sometime during the week preceding her fall she had visited the store and noticed that some counters, in the back part of the store, not in the part where she had slipped but in another department, had been moved; that at that time she inquired of an unidentified clerk what was happening and was told that "they were getting ready to oil the floors." Mrs. Hill did testify that the floors were oiled Sunday night, March 10, the night before the accident, but when this developed to be hearsay, plaintiff's counsel expressly requested that this evidence be stricken. Such an order was made and the jury instructed to disregard this testimony.

Mrs. Hill testified that "occasionally" customers and sales girls had fallen in the store "but it has always been whenever the floor had been gone over with it * * * when the floor has first been oiled." Mrs. Hill, who was plaintiff's main witness, also testified that about fifteen or twenty minutes after the accident she examined the spot where plaintiff fell "to see if there was anything wrong," and was unable to find any foreign material or dirt on the floor.

The above constitutes a complete summary of all the evidence most favorable to plaintiff. The basic question presented is whether that evidence, and all the reasonable inferences based thereon, support the implied finding that defendant was negligent.

[1-4] In determining this question certain fundamental principles must be kept in mind. The plaintiff was a business guest of defendant. To her the defendant owed a duty of exercising reasonable and ordinary care to keep the premises in a reasonably safe condition. But the owner of a place of business is not an insurer of the safety of his invitees. In order to impose liability on the owner it must be shown that a dangerous condition existed, and that the defendant knew or should have known of it. While under some circumstances, negligence may be inferred from the existence of a dangerous condition, the burden rests upon the plaintiff to show the existence of a dangerous condition, and that the defendant knew or should have known of it. No inference of negligence arises based simply upon proof of a fall upon the owner's floor. The doctrine of res ipsa loquitur is not applicable to such cases.

These principles are well settled and not in dispute. In most cases where the problem has been discussed there has been proof of a dangerous condition created by the owner, or proof of some foreign substance upon the floor, Blumberg v. M. & T. Incorporated, 34 Cal.2d 226, 209 P.2d 1—dangerous mat placed on floor by owner; Wills v. J. J. Newberry Co., 43 Cal.App.2d 595, 111 P.2d 346—vomitus on the floor; Hechler v. McDonnell, 42 Cal.App.2d 515, 109 P.2d 426—floor mopped and still wet when plaintiff fell; Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128—wet floor; Rothschild v. Fourth & Market St. R. Co., 139 Cal.App. 625, 34 P.2d 734—floor slippery from wax recently applied; Williamson v. Hardy, 47 Cal.App. 377, 190 P. 646—oil paper placed on floor; Lamb v. Purity Stores, Inc., 119 Cal.App. 690, 7 P.2d 197—excess oil upon the floor; Winsby v. Kertell, 10 Cal.App.2d 61, 50 P.2d 1075—wet leaves on floor; Stoddard v. Roberts Public Markets, Inc., 27 Cal.App.2d 166, 80 P.2d 519—wet spot in aisle of store; De Verdi v. Weiss, 16 Cal.App.2d 439, 60 P.2d 879—soap and water on steps; Brown v. Holzwasser, Inc., 108 Cal.App. 483, 291 P. 661—slippery shiny spot on floor; Nicola v. Pacific Gas & Electric Co., 50 Cal.App.2d 612, 123 P.2d 529—floor very slippery, just been waxed, had not been polished and others slipped just before plaintiff. In all of these cases, and in every other case we have found on the subject where liability has been imposed, the plaintiff has offered evidence of some dangerous condition either created by the owner or known to him.

[5] Tested by these standards, it must be held that, as a matter of law, the evidence fails to support the implied finding that defendant was negligent. Interpreted most strongly in favor of plaintiff, as it must be, the evidence shows that plaintiff slipped and fell, and, that after she fell, there was a greasy substance on her stocking, coat and skirt. There is no evidence of any foreign substance on the floor. There is no evidence that the floors were recently oiled or waxed. There is no evidence, in fact, that the floor was slippery. If it may be inferred from the spots on her clothing that there was oil on the floor, there is no evidence as to how long it had been there or that defendant knew or should have known of its presence. To impose liability in the present case it would have to be held that where the evidence shows that an invitee has fallen in a store from some unexplained cause and that when she got up had greasy spots on her clothes, and that the floors had not been treated with any substance for sixteen days, such evidence supports a finding of negligence. No decided case in this jurisdiction has stated such a rule. The only way the present judgment could be sustained would be to hold that the happening of the accident raises an inference of negligence or that the doctrine of res ipsa loquitur is applicable. That is not the law. While the recent cases have gone quite far, and properly so, in imposing liability in such cases, and while there has been a liberalizing of the old rigid rules applicable to such cases, no California case has gone to the extent required to affirm the judgment in this case.

None of the cases cited by plaintiff suggests a contrary rule. The case most strongly relied upon is Hatfield v. Levy Brothers, 18 Cal.2d 798, 117 P.2d 841. There a plaintiff was allowed to recover for damages sustained when she slipped and fell on a waxed floor. In that case the plaintiff testified that she slipped on some excess wax. Admittedly, the floor had been waxed the morning of the accident. Several witnesses testified that the floor was extremely slippery. The employee who waxed the floor testified it was slippery. Another witness testified that she had slipped on the floor near the same spot where plaintiff fell. In upholding the judgment the court stated, 18 Cal.2d at page 805, 117 P.2d at page 845: "The jury may well have inferred from the evidence establishing the facts above recited that the floor would not ordinarily be slippery from waxing unless an excess quantity of wax was applied, which does not occur unless the operator is 'very careless'; that such fact taken with the facts that the wax was applied just prior to the accident, that the amount of wax applied was controlled by the one operating the application machine, that the floor was very slippery after the application, that plaintiff, Pearl Hatfield, did slip and fall, and that there was wax on her coat, would amply justify the inference that there was negligence in applying an excess quantity of wax which was the proximate cause of the injury. That inference is fortified when we consider that the evidence shows that Pearl Hatfield was wearing low-heeled shoes and, at the time she fell, was walking carefully and deliberately; that she testified she slipped on wax on the floor and there were spots on her coat that had the appearance of wax."

[6] The evidence in that case is much stronger than the evidence in the instant one. Here there was no evidence that there was any excess wax, oil or other substance on the floor; there was no evidence that myco-sheen was a wax; there was no evidence that the floor was slippery; there was no evidence of any negligence in applying the myco-sheen or in maintaining the floor; there was no evidence of any foreign substance of any kind on the floor. While there is a duty on the part of the owner of a store to police and inspect the aisles, the minimum duty of a plaintiff is to show that the aisles were in fact unsafe and that she fell because of that condition. That, the plaintiff in the instant case did not do. The evidence that sometime during the week prior to the accident a clerk had told plaintiff that counters in another part of the store were being moved so that the floor could be oiled, falls far short of proving that the floors were oiled just prior to the accident, or if they were, that such condition caused the accident.

The judgment appealed from is reversed.

BRAY, J., concur.

WARD, Justice.

I concur in the judgment.

I do not approve of the statement "dangerous mat placed on floor by owner," in reference to Blumberg v. M. & T. Incorporated, 34 Cal.2d 226, 209 P.2d 1, as appears in the main opinion 213 P.2d on page 419 thereof.

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95 Cal.App.2d 507

In re RYKER'S ESTATE.

DUNHAM et al. v. SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO et al.

No. 14270.

District Court of Appeal, First District, Division 1, California.

Jan. 10, 1950.

Rehearing Denied Feb. 9, 1950.

Hearing Denied March 6, 1950.

Certiorari by May F. Dunham, as administratrix of the estate of Hazel Ryker, deceased, and another, against Superior Court of the State of California, in and for the city and county of San Francisco and another, to review action of probate court in denying a motion to vacate an order confirming a sale of realty.

An appeal from an order denying the motion was dismissed by District Court of Appeal, 92 Cal.App.2d 162, 206 P.2d 406, on ground that order of denial was not appealable.

The District Court of Appeal, Ward, J., dismissed the writ, holding that certiorari could not be substituted for an appeal. It was further held on petition for rehearing, per curiam, that the motion was addressed to the sound discretion of the probate court and that where it had documents before it setting forth the facts, its action in denying the motion could not be disturbed.

1. Executors and administrators ⚷379

Where no appeal was taken from order in probate confirming sale of realty and probate court had jurisdiction to confirm the sale, aggrieved parties could not, under guise of certiorari to review denial of motion to amend order, test validity of order since certiorari could not be substituted for an appeal. Code Civ.Proc. §§ 473, 1068; Probate Code, §§ 755, 760, 1240.

2. Certiorari ⚷5(1)

Certiorari lies only where there is no appeal. Code Civ.Proc. § 1068.

3. Certiorari ⚷64(1)

In "certiorari" the supervisory authority of the reviewing court does not extend beyond question of jurisdiction. Code Civ.Proc. § 1068.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Certiorari".

4. Certiorari ⚷64(1)

"Writ of review" cannot be extended to the merits, as is the case in appeals from judgments of inferior courts. Code Civ. Proc. § 1068.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Writ of Review".

5. Certiorari ⚷5(1)

Certiorari cannot be substituted to an appeal. Code Civ.Proc. § 1068.

6. Certiorari ⚷5(1)

Certiorari cannot be used as a mere writ of error for correction of mistakes either in law or facts committed by inferior tribunal within limits of its jurisdiction whether there is an appeal or not. Code Civ.Proc. § 1068.

7. Certiorari ⚷1

The writ of certiorari is available only if there exists an excess of jurisdiction on part of inferior tribunal, no right of appeal, and no other plain, speedy and adequate remedy. Code Civ.Proc. § 1068.

On Petition for Rehearing

8. Executors and administrators ⚷379

A motion to vacate an order of the probate court confirming the sale of real estate on the ground that a portion thereof with respect to payment of realtor's commission should be expunged therefrom because included through mistake, inadvertence and excusable neglect was addressed to the sound discretion of the probate court and where it had documents setting forth the facts before it, the appellate court could not say as a matter of law that it abused its discretion in denying the motion. Code Civ. Proc. § 473.

Robert E. Hatch, Norman S. Stimmel, Emmet B. Hayes, San Francisco, attorneys for petitioners.

A. J. Zirpoli, San Francisco, attorney for respondent Paul R. Weisenberger.

WARD, Justice.

A writ of certiorari was issued to review the action of the probate court denying a motion made under section 473 of the Code of Civil Procedure to vacate an order made confirming the sale of real estate. Prob.Code, § 755. An appeal was taken from the order denying the motion made under the aforesaid section 473, which was dismissed by the appellate court on the ground that the order of denial was not appealable. Prob.Code, § 1240; In re Estate of Ryker, 92 Cal.App.2d 162, 206 P.2d 406.

It was stipulated that the record on appeal (92 Cal.App.2d 162, 206 P.2d 406) could be used by this court in determining the merits of the petition for certiorari. The clerk's transcript on the appeal sets forth a notice of intention filed in the Superior Court of the City and County of San Francisco to sell "to the highest and best bidder" certain real estate in the Estate of Hazel Ryker (the identical property described in the Code of Civil Procedure section 473 proceeding). The notice is signed by the administratrix, May

F. Dunham, and requires that all bids and offers should be submitted to the administratrix at a designated room in Mills Tower, San Francisco (4), California. The attorney representing the administratrix maintains law offices in Mills Tower. The report of sale and petition for confirmation are verified by the attorney for the administratrix allegedly "for the reason that said petitioner is outside the City and County of San Francisco," and avers that he "knows the contents" of the petition. The report of sale and petition for confirmation set forth that: "Said sale was accomplished through Paul R. Weisenberger and by reason thereof said Paul R. Weisenberger is entitled to a 5% real estate commission in the amount of $837.50. Wherefore, petitioner prays that this report be accepted and said sale be confirmed; that petitioner be authorized and directed to execute a deed of said property to said purchaser upon the payment by him of the unpaid balance due under said contract; that petitioner be authorized and directed to pay the sum of $837.50 as real estate commission on said sale to Paul R. Weisenberger, and for such other order as may be proper." This allegation was made positively and is not on information and belief.

Following a hearing on the report of sale and petition for confirmation, the court made its order confirming sale, which in part provides: "It Is Hereby Further Ordered that said administratrix pay the sum of $837.50 to Paul R. Weisenberger as and for realtor's commissions." An order confirming the sale of property is appealable. Prob.Code, § 1240. However, no appeal was filed from the order confirming the sale.

Subsequently, an order to show cause was served upon the administratrix and her attorney with respect to the nonpayment to Paul R. Weisenberger of the realtor's commission directed to be paid to him under the order confirming the sale of real estate. Shortly thereafter a motion to amend the confirming order was filed upon the ground that the portion with respect to the payment of $837.50 as realtor's commission should be expunged therefrom as it "was included in said Order through mistake, surprise, inadvertence and excusable neglect." A hearing was had and the motion to amend the order was denied. Thereupon a notice of appeal from the order denying relief under Code of Civil Procedure section 473 was filed. The appellate court dismissed the appeal upon the ground that "No provision is found for an appeal from an order denying an amendment to or the vacation of an order of confirmance." In re Estate of Ryker, 92 Cal. App.2d 162, 206 P.2d 406; citing In re Estate of O'Dea, 15 Cal.2d 637, 104 P.2d 368, and In re Estate of Brady, 32 Cal.2d 478, 196 P.2d 881.

As previously stated, the purpose of the present petition for a writ of certiorari is to have this court review the motion and order made under section 473 of the Code of Civil Procedure and to determine the precise question raised on the aforementioned appeal. (92 Cal.App.2d 162, 206 P. 2d 406.)

[1] The applicability of Probate Code section 760 to the facts on this certiorari petition has been suggested. In view of the decision that has been reached herein that a writ of review may not be substituted for an appeal, it is not necessary to consider the question. The problem presented on its merits resolves itself into the sufficiency of the evidence to sustain the order confirming the sale of the real estate. As no appeal was taken from that order, the real question on this proceeding is whether under the guise of certiorari a test may be made of the validity of an appealable order from which the aggrieved parties, if they were aggrieved, failed to appeal.

[2–7] No claim is made that the probate court did not have jurisdiction of the subject matter and the parties concerned in making the order confirming the sale. "Certiorari lies only where there is no appeal. * * * The distinction between certiorari and appeal is clear, in that in certiorari the supervisory authority of the reviewing court does not extend beyond the question of jurisdiction. Under no circumstances can the writ of review be extended to the merits, as is the case in appeals from judgments of inferior courts. Certiorari cannot be substituted for an appeal; nor can it be used as a mere writ of error for the correction of mistakes, either in law or fact, committed by the inferior tribunal within the limits of its jurisdiction, whether there is an appeal or not." 4 Cal.Jur. 1021-1022, § 3; Wilde v. Superior Court, 53 Cal. App.2d 168, 127 P.2d 560; Homan v. Board of Dental Examiners, 202 Cal. 593, 262 P. 324; Gladding v. Superior Court, 7 Cal. 2d 408, 60 P.2d 857; Estrin v. Superior Court, 14 Cal.2d 670, 96 P.2d 340. In Redlands High School District v. Superior Court of San Bernardino County, 20 Cal. 2d 348, at page 350, 125 P.2d 490, at page 491, the court stated: "The writ of certiorari is available in this state only if the following conditions are present: (1) An excess of jurisdiction on the part of an inferior tribunal; (2) no right of appeal; and (3) no other plain, speedy and adequate remedy. Code Civ.Proc., § 1068; * * *." In the present proceeding there was no excess of jurisdiction, and there was a right of appeal.

The petition may not be entertained. It is immaterial that the attorney for the administratrix claims that he made a mistake, which in any event the trial court evidently did not believe. The court had jurisdiction to confirm the sale.

The writ is dismissed.

PETERS, P. J., and BRAY, J., concur.

On Petition for Rehearing

PER CURIAM.

[8] On this petition for rehearing it is urged that an appeal from the order confirming sale would not have permitted petitioners to secure a review of their motion, made under section 473 of the Code of Civil Procedure, to amend the order confirming sale by striking out the provision relating to the realtor's commission. Even if it be assumed that the nonappealable order here involved may be reviewed on certiorari, the action of the trial court cannot be disturbed. This motion was addressed to the sound discretion of the trial court. It had before it the documents prepared by petitioners' attorney setting forth the facts, the subsequently filed affidavit and the evidence. We cannot say, as a matter of law, that the trial court abused its discretion in denying the motion. It had evidence before it that sustains its position.

The petition for rehearing is denied.

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95 Cal.App.2d 543

FRIEDRICH v. ROLAND et al.

Civ. 17008.

District Court of Appeal, Second District, Division 3, California.

Jan. 11, 1950.

Rehearing Denied Feb. 8, 1950.

Leon A. Friedrich sued Charles Roland and Dorothy Roland, also known as Dorothy Bartholomew, for specific performance of a contract to sell a parcel of real property and for damages, wherein the first named defendant filed a cross-complaint.

Judgments in favor of the plaintiff was entered in the Superior Court of Los Angeles County, Percy Hight, J., and both defendants appealed.

The District Court of Appeal, Vallée, J., held that plaintiff could not require first named defendant to specifically perform as to the interest owned by second named defendant and for which first named defendant had no right to call for the legal title, and that trial court abused its discretion in denying motion of second named defendant to be relieved from her default.

Judgments reversed.

1. Pleading 🔑8(7)
Specific performance 🔑114(2)

A complaint seeking enforcement of contract must allege facts which showed that contract is fair and consideration adequate and that it would not be inequitable to enforce it, and a general allegation that contract is just and reasonable and the consideration adequate is a mere conclusion of law.

2. Specific performance 🔑114(2)

A complaint seeking specific performance of contract to sell parcel of real property which alleged making of the contract and that "the consideration named therein [$1,000] was, at the time of making the said agreement, the fair and reasonable value of said real property," sufficiently alleged that contract was fair and the consideration adequate.

3. Pleading 🔑8(4)
Specific performance 🔑114(2)

An allegation that property is worth a certain sum is an averment of fact, and, where such sum appears to be no greater than price agreed upon for sale, plaintiff has fully complied with his obligation to show by averment of appropriate facts that consideration for the contract sought to be specifically enforced is adequate.

4. Specific performance ⚷121(8)

Evidence supported finding that plaintiff, who was licensed real estate broker, was not guilty of fraud in entering into contract with defendant to purchase real estate which had been listed with him for himself and that defendant knew that he was selling property to plaintiff, so that plaintiff was not precluded from enforcing the contract.

5. Mines and minerals ⚷79(1)

The royalty interest conveyed by each landowner to his colessors under a community oil lease is an "incorporeal hereditament in gross", and incorporeal hereditament owed by lessor in oil produced from lands of his colessors existing in gross does not follow conveyance of lessor's land but can only be conveyed by specific conveyance of that interest.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Incorporeal Hereditament in Gross".

6. Joint tenancy ⚷8

Where property agreement entered into by parties who had been living together for many years as husband and wife without being married provided that woman was to convey to man her interest in parcel of property owned by them as joint tenants and which they had joined in execution of community oil lease, but contained no provision for her conveying her royalty interest under the lease, woman's conveyance of the land did not carry with it her royalty interest under the lease.

7. Specific performance ⚷13

A vendor who has no title or interest in land he contracts to convey cannot specifically perform, as equity will not compel him to obtain title, but where vendor is equitable owner of property and has right to call for legal title, he may be compelled by vendee to specifically perform the contract.

8. Specific performance ⚷10(1)

Where vendee contracted to convey land, which was subject to community oil lease, together with all oil rights, but vendee under property agreement which he entered into with woman whom he had been living with as husband and wife did not obtain any right in such woman's interest in oil produced from lands of co-lessors under lease, vendor, at his option, could require vendee to specifically perform contract as to property owned by him as to which he had right to call for legal title, but he could not require vendee to specifically perform as to the interest which he did not secure under the property settlement.

9. Stipulations ⚷14(12)

Where parties to suit for specific performance of contract to sell parcel of real property stipulated that decree should provide that note given by defendant to plaintiff should be delivered up and cancelled, trial court erred in failing to make specific findings with respect to the matter and to provide judgment for cancellation of the note.

10. Judgment ⚷363

The statute authorizing court to relieve party from judgment taken against him through his mistake, inadvertence, surprise or excusable neglect is remedial in its nature and is to be liberally construed so as to dispose of cases on their merits. Code Civ.Proc. 473.

11. Appeal and error ⚷982(2)

Reviewing courts will scan more closely and are more prone to reverse orders denying relief from judgments on ground of mistake, inadvertence, surprise or excusable neglect than orders granting such relief. Code Civ.Proc. § 473.

12. Judgment ⚷143(3)

Where affidavit of defendant against whom default judgment was entered in action for specific performance of contract to sell property, together with oil rights under community oil lease, showed that such defendant believed when served with complaint and summons in the action that she no longer had any interest in property because of property settlement agreement which she had entered into, and that she did not learn of her interest until just prior to making the motion, trial court abused its discretion in denying motion to relieve her from her default. Code Civ.Proc. § 473.

Lauren M. Handley, Los Angeles, for appellants.

Edmund I. Read, Wilmington, for respondent.

VALLÉE, Justice.

Leon A. Friedrich commenced this action against Charles Roland and Dorothy Roland for specific performance of a contract to sell a parcel of real property and for damages. Charles Roland filed an answer and cross-complaint to rescind and cancel the contract on the ground of fraud. The summons and complaint were served on Dorothy Roland. Not having answered in the time allowed by law her default was entered. She thereafter moved to be relieved of the default. Her motion was denied. Judgment was for Friedrich. Charles Roland and Dorothy Roland appealed. Their appeals require separate consideration.

Appeal of Charles Roland

Charles Roland and Dorothy Roland for many years lived together as man and wife without being married. They acquired Lot 108, Tract 2249 as joint tenants. In 1942, as lessors, they joined in the execution of a community oil lease covering Lot 108 under the terms of which they held as joint tenants 1.67295 per cent of the lessor's one-fifth interest. A well was not drilled on Lot 108. From 1942 to March 31, 1948, they received royalties from oil produced from other property under the lease. Prior to July, 1946, they separated. July 18, 1946, they entered into a written property settlement agreement in which Dorothy for a consideration agreed to convey Lot 108, Tract 2249 to Charles. No mention was made of the royalty interest under the oil lease in this agreement. Dorothy did not convey Lot 108 to Charles and he instituted an action against her to compel her to specifically perform her contract. She defaulted and judgment followed on September 12, 1946. The judgment did not mention the royalty interest held by her in the community oil lease, nor did it order her to convey her interest therein to Charles.

The cross-complaint alleged that Friedrich throughout 1946 was a licensed real estate broker; that about March, 1946, Charles listed Lot 108, together with the royalty interest, with Friedrich for sale for $1800 and that several months later Friedrich informed Charles that he could not sell at $1800 and suggested that the listing be reduced to $1500, to which Charles agreed. These allegations were not denied. The listing was verbal.

October 31, 1946, Charles entered into a contract in writing with Friedrich by which he agreed to sell and Friedrich agreed to buy Lot 108 and all oil rights for $1000. Dorothy was not a party to this contract. Friedrich at the time paid Charles $600. The balance was to be paid through escrow. The contract provided that an escrow was to be opened on November 4, 1946. Charles testified that between October 31 and November 4, he learned for the first time that the decree in the specific performance action he had brought against Dorothy did not require her to convey the royalty interest in the oil lease, and that shortly after November 4 he told Friedrich that he could not go on with the deal because he could not deliver good title and that he then offered to return the $600. Friedrich denied that Charles offered to return the $600. Friedrich signed escrow instructions. Charles did not.

November 2, 1946, Friedrich entered into a contract in writing with Munson by which he agreed to sell and Munson agreed to buy Lot 108 and all oil rights for $1500, subject to the purchase from Charles being completed. Munson owned the property immediately adjoining Lot 108.

August 6, 1947, Charles signed and delivered to Friedrich a promissory note for $500, payable 90 days after date.

January 12, 1948, Charles served on Friedrich a notice of rescission of the contract of October 31, 1948, and therein offered to restore the $600 he received. Charles testified that just prior to giving the notice he discovered for the first time that Friedrich had been in contact with Munson on several occasions in October, 1946, and knew that he (Friedrich) could sell the property to Munson for $1500.

[1–3] Charles Roland first contends that the complaint does not state facts sufficient to constitute a cause of action for the reason that it does not allege any facts showing that the contract of October 31, 1946, was just and reasonable or that the consideration was adequate. He demurred to the complaint both generally and specially. His demurrer was overruled. The complaint alleged the making of the contract, setting it forth in *haec verba* and that "the consideration named therein [$1000] was, at the time of making the said agreement, the fair and reasonable value of said real property." There was no other averment bearing on the point. "It is not sufficient to allege generally that the contract sought to be enforced is just and reasonable and the consideration adequate; such allegations are regarded as mere conclusions of law; to be sufficient the complaint must allege facts which show that the contract is fair and the consideration adequate, and that it would not be inequitable to enforce it." 23 Cal.Jur. 495, sec. 53, and cases there cited. The allegations were sufficient to meet the rule. In W. G. Reese Co. v. House, 162 Cal. 740, at page 745, 124 P. 442, at page 444, the court said, "But such facts [that the consideration was fair and adequate] are sufficiently alleged in the complaint before us, in which, as we have seen, there is a specific averment to the effect that the sum of $2,400, mentioned in the option, is and at all times since the execution of the agreement has been a fair and reasonable value of said property. Brown v. Town of Sebastopol, 153 Cal. 704, 96 P. 363, 19 L.R.A.,N.S., 178. An allegation that property is reasonably worth a certain sum is an averment of a fact, and, where such sum appears to be no greater than the price agreed upon for the sale, the plaintiff has fully complied with his obligation to show by averment of appropriate facts that the consideration for the contract sought to be specifically enforced is adequate. See, White v. Sage, supra [149 Cal. 613, 87 P. 193]." See, also, Foley v. Cowan, 80 Cal. App.2d 70, 74–76, 181 P.2d 410; Boro v. Ruzich, 58 Cal.App.2d 535, 540, 137 P.2d 51; Minaker v. Sunset Building & Real Estate Co., 25 Cal.App. 771, 773, 145 P. 542.

[4] Charles Roland claims that a confidential relationship existed between himself and Friedrich; that Friedrich knew at the time he agreed to buy the property for $1000 that he could immediately sell it to Munson for $1500 and that he did. He relies on the rule that the law imposes on a real estate agent the same obligation of undivided service and loyalty that it imposes on a trustee in favor of his beneficiary, Civ.Code, secs. 2228, 2230, 2322, subd. 3; Rattray v. Scudder, 28 Cal.2d 214, 222, 169 P.2d 371, 164 A.L.R. 1356, and the principle which prohibits an agent from concluding with himself directly or indirectly any transaction in which he is employed as an agent without the fullest disclosure of the fact and all circumstances relating to it and without permission or acquiescence of the principal with full knowledge of all these facts. Sands v. Eagle Oil & Refining Co., 83 Cal.App.2d 312, 318, 188 P.2d 782. He refers to the Sands case in which the court stated, 83 Cal.App.2d at page 320, 188 P.2d 786, that when "the agent concludes a real estate transaction with himself without the knowledge of his principle such a transaction will always be set aside at the option of the principal. Absence of actual fraud in the transaction; of undue advantage for the agent; of injury to the principal or of other similar features is then immaterial. The rule is intended to prevent temptation and the possibility of wrong. Only ratification by the principal after full knowledge of all facts can defeat his right to avoid the transaction. Burke v. Bours, 92 Cal. 108, 28 P. 57; Sterling v. Smith, 97 Cal. 343, 347, 32 P. 320; Newell-Murdoch Realty Co. v. Wickham, 183 Cal. 39, 44, 190 P. 359; Butler v. Agnew, 9 Cal.App. 327, 332, 99 P. 395; Silver v. Logue, 127 Cal.App. 565, 572, 16 P.2d 183." These principles are not applicable to the facts. The court found that Friedrich was not guilty of fraud. The finding is supported by the evidence. Charles knew that he was selling to Friedrich. There was evidence from which the court could have inferred that Charles promoted the sale at $1000 because he was badly in need of money. Friedrich and Munson each testified that he did not discuss the possible purchase of the property until November 2, 1946. While the evidence would

have supported a contrary finding, this court may not disturb the finding made.

[5, 6] The court found and adjudged that Charles was on October 31, 1946, the owner of Lot 108, together with 1.67295 per cent of the lessor's one-fifth royalty in the community lease. This finding is not supported by the evidence. The proof established that on October 31, 1946, Charles and Dorothy were the owners of Lot 108 and of the royalty interest in oil produced under the community lease as joint tenants. Dorothy in the property settlement agreement agreed to convey Lot 108 to Charles. She was ordered by court decree to convey Lot 108 to Charles. She did not agree to convey her royalty interest to Charles. Friedrich says the evidence shows she intended to agree to convey it. Whether she intended to is of no moment. The fact is that she did not agree to convey her royalty interest. The judgment in the specific performance action did not require Dorothy to convey her royalty interest to Charles. In fact the judge who rendered the judgment in that action expressly eliminated therefrom provisions to that effect. The contract on the part of Dorothy to convey Lot 108 to Charles carried with it her interest in the percentage of the royalty reserved by them in oil produced from Lot 108. It did not carry with it an agreement to convey her interest which she owned as a colessor in oil produced from the lands of other colessors. By the execution of the community lease, Charles, Dorothy, and each of the other lessors, conveyed to his colessors a percentage interest in all oil produced on his land by the lessee during the continuance of the lease. The royalty interest thus conveyed by each landowner to his colessors is an estate in real property, an incorporeal hereditament in gross. The incorporeal hereditament owned by the grantor in the oil produced from the lands of his colessors existing in gross does not follow the conveyance of the lessor's land but can only be conveyed by a specific conveyance of that interest. Tanner v. Title Ins. & Trust Co., 20 Cal.2d 814, 820, 129 P.2d 383. As Dorothy did not agree to convey to Charles her incorporeal hereditament in gross in oil produced from the lands of other colessors, the trial court erred in adjudging that Charles is the owner of the 1.67295 per cent royalty interest.

[7, 8] Where a vendor has no title or interest in the property he contracts to convey, he cannot be required to specifically perform. Equity will not compel him to obtain title. Where the vendor, however, is the equitable owner of the property and has the right to call for the legal title, he may be compelled by the vendee to specifically perform the contract. Milkes v. Smith, 91 Cal.App.2d 79, 204 P.2d 419. Charles by reason of the property settlement and the decree in the specific performance action had the right to call for the legal title of Dorothy's interest in Lot 108 and for her percentage of the royalty in oil produced from Lot 108. He had no right whatever in the interest owned by Dorothy in oil produced from the lands of their colessors, nor did he have any right to call for the legal title to such interest. Friedrich, at his option, can require Charles to specifically perform the contract as to the property owned by him and as to which he had the right to call for the legal title. Milkes v. Smith, supra. He cannot require Charles to specifically perform as to the interest owned by Dorothy and for which he has no right to call for the legal title. The court erred in decreeing that Charles convey to Friedrich Dorothy's interest in the oil produced from the lands of their colessors.

The judgment awarded Friedrich all of the income received by the Rolands from the community lease from October 31, 1946, to March 31, 1948. This income came from oil produced from lands under the lease other than Lot 108. One-half of this income was the property of Dorothy. For the reasons heretofore stated, the court erred in making this award.

[9] In the cross-complaint Charles alleged that he was unable to give clear title to Lot 108 by reason of the refusal of Dorothy to sign a deed and that Friedrich offered to cancel and rescind the contract of October 31, 1946, on condition that Charles pay him $500, the profit he claimed to have lost by reason of the inability of Charles to convey. He alleged that on August 6, 1947, at the instance of Friedrich, he signed and delivered to him a promissory

note for $500. He alleged that the note was procured by fraud. The answer to the cross-complaint alleged that prior to delivery of the note, Friedrich had agreed to accept the note, together with $600 in cash, from Charles in full satisfaction of his claim against Charles for failing to comply with the contract, that Charles did not pay the $600 within the time agreed upon, that he (Friedrich) did not accept the note and was willing to return it. On at least two occasions at the trial the parties stipulated that the decree should provide that this note be delivered up and cancelled. No express findings were made with respect to these issues. The only finding at all applicable to them is "that all of the denials, allegations and averments of the answer and cross-complaint of defendant, Charles Roland, which are adverse to or inconsistant with the allegations and averments of said plaintiff's complaint and answer to defendant's cross-complaint are untrue, and that all of the denials, allegations and averments of plaintiff's answer to said defendant's cross-complaint are true." This finding is unintelligible. If it is a finding that the note was not executed it is contrary to the admission in the answer to the cross-complaint and to the stipulations of the parties. No conclusion or decree was made concerning the note. The evidence is not at all clear as to the purpose or effect of the agreement with respect to the giving of the note and the payment of the $600. Whether the same constituted a settlement of the controversy between Charles and Friedrich, leaving an obligation on the part of Charles to pay Friedrich $600, cannot be ascertained from the evidence. In any event, it was error not to make specific findings with respect to the matter and to provide in the judgment for cancellation of the note.

Appeal of Dorothy Roland

[10-12] Dorothy Roland claims that the court abused its discretion in denying her motion to relieve her from her default. In her affidavit in support of her motion, Dorothy in effect stated that she was unaware of the fact that the property settlement agreement did not provide for conveyance to Charles of all of her interest in the community lease and of the fact that the decree in the specific performance action did not require her to convey that interest; that she believed when served with the complaint and summons in this action that she no longer had any interest in the property, and that just prior to making the motion she learned that she did have an interest. The facts fully justified her erroneous belief. Her showing in this regard was not contradicted by any competent evidence. Her motion was supported by a sufficient affidavit of merit and she tendered a verified answer in which she denied the allegations of the complaint. Whether her mistake was one of fact or one of law, it was ground for relief from the default. 14 Cal.Jur. 1035, sec. 95.

Code of Civil Procedure, section 473, providing that a trial court may relieve a party from "a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect" is remedial in its nature and is to be liberally construed. Sound policy favors the determination of actions on the merits. Potts v. Whitson, 52 Cal.App.2d 199, 209, 125 P.2d 947. "Because of this," as said in Kent v. County Fire Ins. Co., 27 Cal.App.2d 340, 341, 80 P.2d 1019, 1020, "the reviewing courts will scan more closely orders denying relief and are more prone to reverse orders of denial. They look with disfavor upon a party, who, regardless of the merits of his case, attempts to take advantage of mistake, surprise and inadvertence of his adversary. Brill v. Fox, 211 Cal. 739, 743, 297 P. 25." The discretion of the lower court in ruling upon matters under section 473 is a legal discretion, not an arbitrary one. Under the circumstances of the case at bar we think it patent that Dorothy should have been relieved of her default.

Other errors assigned are not likely to occur on a retrial and need not be considered.

The judgment in favor of plaintiff and cross-defendant Friedrich and against defendant and cross-complainant Charles Roland is reversed. The judgment in favor of plaintiff Friedrich and against defendant Dorothy Roland is reversed with directions to relieve her of her default and allow her to plead to the complaint.

SHINN, P. J., and WOOD, J., concur.

95 Cal.App.2d 527

JOHNSTONE v. STATE BOARD OF EQUALIZATION et al.

Civ. 14164.

District Court of Appeal, First District, Division 1, California.

Jan. 11, 1950.

Hearing Denied March 6, 1950.

Bruce Johnstone filed a petition for a writ of mandate to compel the State Board of Equalization of the State of California to cancel a seasonal liquor license issued to May Richardson on ground that license had been illegally issued.

A judgment denying the petition was entered by the Marin County Superior Court, Edward I. Butler, J., and the plaintiff appealed.

The District Court of Appeal, Peters, P. J., affirmed the judgment on ground that the statute restricting general on-sale liquor licenses to one for each 1000, or fraction thereof, inhabitants of county had no application to seasonal licenses.

1. Intoxicating liquors ⚷46½

The statute restricting general on-sale liquor licenses to one for each 1000, or fraction thereof, inhabitants of county has no application to seasonal licenses, and State Board of Equalization is not restricted as to number of such licenses it may issue. Gen.Laws, Act 3796, §§ 1, 2(u), 38f; Const. art. 20, § 22.

2. Constitutional law ⚷70(3)

The question as to policy of a law in placing issuance of seasonal on-sale liquor licenses in discretion of State Board of Equalization is for the Legislature, and not the courts. Gen.Laws, Act 3796, §§ 1, 2(u), 38f.

Bruce Johnstone, Inverness, appellant, in propria persona.

R. J. Hecht, San Francisco, for appellant.

Fred N. Howser, Attorney General, J. Albert Hutchinson, Deputy Attorney General, for respondent State Board of Equalization.

PETERS, Presiding Justice.

In August of 1947, respondent May Richardson, over the protests of petitioner, Bruce Johnstone, who is a resident of Inverness, Marin County, was issued a seasonal liquor license permitting her to sell hard liquor at Inverness Lodge. After pursuing, unsuccessfully, his remedies before the State Board of Equalization, petitioner sought a writ of mandate from the Superior Court to compel the Board to cancel the license on the ground that the license had been illegally issued. From a judgment denying his petition, Johnstone appeals.

Although several issues were presented by the petition and return thereto, this appeal has been taken on the clerk's transcript and a stipulation between the parties. The stipulation provides:

"1. The issues in the above-entitled cause shall be restricted to an interpretation and application of the Alcoholic Beverage Control Act, Stats. of 1935, p. 1123, Deering's General Laws, Act 3796, and of Article XX, Section 22 of the Constitution of the State of California, to the issuance of the seasonal on-sale general license, as referred to in said Act, by the Board to said May Richardson, and more particularly to the issue whether the issuance of said license to said May Richardson is affected or controlled by the provisions of section 38f of said Act;

"2. That for the purposes of determining the issues referred to and defined in Paragraph numbered '1' hereof, the Court may assume that said May Richardson was at all times herein mentioned fully qualified for a seasonal on-sale general license, unless the issuance thereof to said May Richardson was or is affected by said Section 38f of said Act and, except for the effect, if any, of said Section 38f of said Act, said license was at all times herein mentioned duly and lawfully issued by the Board to said May Richardson;

"3. That the Court may assume that, for the purposes of Section 38f of said Act, the number of on-sale general licenses, not including seasonal licenses, issued and in effect in the County of Marin at all times herein mentioned, exceeded in number one per thousand of population of said County."

As limited by the stipulation, the sole question presented on this appeal is whether in computing the number of licenses permitted by section 38f of the Act—one general on-sale license per 1,000 inhabitants—seasonal as well as general licenses should be included. A reading of the pertinent statutes and rules of the Board demonstrates that the answer to this question must be that seasonal licenses never have been used in making such computation, and under the statute and rules should not be so used.

The Constitution, Art. XX, § 22, provides in part: "The State Board of Equalization shall have the exclusive power to license the * * * sale of intoxicating liquors in this State, * * * and shall have the power, in its discretion, to deny or revoke any specific liquor license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals."

The Alcoholic Beverage Control Act, Stats. of 1935, p. 1123, Chap. 330, as amended by Stats. of 1945, Stats. of 1945, p. 2615, Chap. 1401, 2 Deering's General Laws, Act 3796, contains the following pertinent provisions: Sec. 1. "This act shall be deemed an exercise of the police powers of the State, for the protection of the safety, welfare, health, peace and morals of the people of the State; * * * and to promote temperance in the use and consumption of alcoholic beverages; and it is hereby declared that the subject matter of this act involves in the highest degree the economic, social and moral well-being and the safety of the State and of all its people; and all provisions of this act shall be liberally construed for the accomplishments of these purposes."

Section 2(u) provides: "'Retailer's on-sale license' means and includes on-sale beer licenses, on-sale beer and wine licenses, on-sale general licenses, and on-sale distilled spirits licenses for seasonal businesses."

Section 38f is the section which was added in 1945, and which, for the first time, provided a statutory limitation upon the number of premises that can be licensed in any area. The section reads in part as follows:

Sec. 38f. *"Limitation upon number of premises licensed."*

(Par. 1.) "It is hereby determined that the public welfare and morals require that there be a limitation on the number of premises licensed for the sale of distilled spirits."

(Par. 2.) "The number of premises for which an on-sale general license is issued shall be limited to one of such premises for each 1,000, or fraction thereof, inhabitants of the county in which the premises are situated, provided that no additional on-sale general licenses, other than a renewal or transfer or as permitted hereinafter in this section, shall be issued in any county where the number of all premises for which on-sale licenses, other than on-sale beer licenses, are issued shall be more than one of such premises for each 1,000 or fraction thereof, inhabitants of such county, * * *."

(Par. 4.) "The board shall have power to make all rules and regulations consistent with the provisions of Section 22 of Article XX of the Constitution of this State, or this act, necessary to carry into effect the provisions of this section, and to restrict the issuance of alcoholic beverage licenses, including seasonal licenses, * * * to such number in any county as the board shall determine shall be in the interest of public welfare and morals, convenience or necessity."

(Par. 5.) "Whenever it shall be made to appear to the board by satisfactory evidence that the population in any county shall have increased by more than 1,000 or multiples of 1,000 inhabitants * * * and it shall appear to the board that by reason thereof, the inhabitants of such county are unjustly and unfairly discriminated against, and provided that the total number of licenses in such county do not then exceed the maximum specified in the second paragraph of this section, the board shall have power to issue not to exceed one on-sale general license and one off-sale general license for each increase of 1,000 inhabitants in [such] county since the taking of such census. In all other respects the limitation hereinbefore provided for shall continue in effect."

This limitation of one licensed premise for each 1,000 inhabitants first came into our law by rule of the Board adopted in 1939. Rule 41 then adopted provided in subdivision "a" that on-sale distilled spirits licenses should be limited to one licensed premise for 1,000 inhabitants, and subdivision "b" placed the same limitation on the issuance of off-sale distilled spirit licenses. Subdivision "d" then expressly provided that: "On-sale beer and wine and on-sale distilled spirits and off-sale distilled spirits licenses for seasonal businesses shall not be limited in numbers by the restrictions in paragraphs (a) and (b) of this rule, but shall, however, be restricted to premises for which such licenses have heretofore been issued by the board, unless the board shall determine [as it did in the instant case] that the issuance of such licenses for other premises is warranted because of the public convenience or necessity."

In 1943, the rules were revised and the provisions of old rule 41 referred to above were readopted as Rule 14. Then, in 1945, the Legislature adopted section 38f above quoted, thus putting the one—1,000 ratio into the statute. Thus, between 1939 and 1945, by rule, legally adopted by the Board, it is crystal clear that the one licensed premise to 1,000 inhabitants ratio had no application to seasonal hard liquor on-sale licenses. The amendment to the statute in 1945, however, had no application to on-sale beer and wine licenses, so the board, by rule, now Rule 61 (4 Cal.Adm.Code 61), provided that such licenses should be limited to the one per 1,000 rule, but expressly provided that seasonal on-sale beer and wine licenses should not be limited by that ratio. As part of the same rule—61, subd. b—the Board provided: "On-sale distilled spirits licenses for seasonal businesses shall be restricted to premises for which such licenses have heretofore been issued by the board, unless the board shall determine that the issuance of such licenses for other premises is warranted because of the public convenience and necessity." This rule was in effect when the license here involved was issued. It is still in effect except as to a minor amendment not here involved.

From the above quotations from the statutes and rules it is quite apparent that from 1939 to 1945 the Board, by rule, expressly provided that the rule limiting on-sale distilled spirit licenses to one premise per 1,000 inhabitants had no application to seasonal licenses granted for limited periods during the year. It is appellant's theory that the addition of section 38f in 1945 changed this condition by legislative enactment, and that, properly interpreted, that section now applies the ratio rule to seasonal licenses. He argues that under paragraph 4 of section 38f the Board is empowered to issue licenses, including seasonal licenses, less in number than the statutory ratio of one licensed premise per 1,000 inhabitants, but are forbidden to issue more licenses than are allowed by the statutory ratio; that if the rules so provide, the rules must fall because the rules must be consistent with the statute; that the plain meaning of paragraph 4 of section 38f "is that the ratio of one to one thousand is an absolute bar to the issuance of any additional licenses, *whether seasonal or not,* until the increase in population justifies their issuance" (App. Op. Br. p. 10); that the fundamental purpose of the act was to limit the flow of hard liquor permits, and that such fundamental purpose can be and is defeated by the issuance of seasonal licenses with an open hand.

The construction of the statute suggested by appellant is strained and unsound. It is quite apparent that, under the statute and the rules, on-sale general licenses and on-sale hard liquor licenses for seasonal purposes have been treated separately, and that the statute and the rules apply different criteria in restricting their issuance. Under the statute and under the rules the issuance of general licenses is restricted to the statutory ratio, while the issuance of seasonal licenses is restricted only by the public convenience and necessity. This was crystal clear under Rule 41 adopted in 1939, and still in effect as a rule, in somewhat modified form as Rule 61. Section 38f did not change this policy. Paragraph 4 of that section refers to general and seasonal licenses separately and quite clearly makes the statutory ratio binding on the Board as to general on-sale hard liquor licenses, but leaves to the Board to provide by rule for the limitations on the issuance of seasonal hard liquor licenses and for the issuance of beer and wine licenses. This, the Board has done by the rules. Paragraph 2 of section 38f limits the ratio rule by express language to "on-sale general" licenses. Paragraph 4 then confers the rule-making power on the Board, and requires the Board to restrict seasonal licenses in each county as the Board "shall determine shall be in the interest of public welfare and morals, convenience or necessity." Paragraph 5 refers to how the ratio provided by paragraph 2 shall be ascertained in years other than census years. By express language its provisions are limited to paragraph 2.

[1, 2] It is too clear to require further discussion that the statutory ratio has no application to seasonal licenses. Rightly or wrongly, the law puts the issuance of such licenses in the Board unrestricted as to number. While it may be true that the Board, if it should abuse its discretion and should indiscriminately issue seasonal licenses, could defeat the fundamental purpose of the statute, in the present case no abuse of discretion in issuing the license has been argued or shown. Appellant disagrees with the policy of the law in placing the issuance of seasonal licenses in the discretion of the Board. This court has no power to determine that policy. That is a question for the Legislature and not the courts.

The judgment is affirmed.

WARD and BRAY, JJ., concur.

Hearing denied; SHENK and EDMONDS, JJ., dissenting.

PENINSULA PROPERTIES CO., Limited et al. v. SANTA CRUZ COUNTY et al.

PEOPLE v. PENINSULA PROPERTIES CO., Limited et al.

S. F. 17989.

Supreme Court of California, in Bank.

Jan. 17, 1950.

Rehearing Denied Feb. 9, 1950.

Action by Peninsula Properties Company, Ltd., etc., and others against County of Santa Cruz, etc., and others to contest the validity of certain tax deeds wherein the defendant State of California filed a cross-complaint seeking to recover the rents, issues and profits taken and retained by the plaintiffs after the State had become the owner of the property.

The Superior Court, Santa Cruz County, James L. Atteridge, J., denied the plaintiffs' motion to discharge a writ of attachment issued on the cross-complaint, and the plaintiffs appealed.

The Supreme Court, Gibson, C. J., held that the cross-complaint stated a cause of action that issuance of attachment was proper.

Order affirmed.

For prior opinion see 205 P.2d 97.

1. Attachment ⟹232

A motion to discharge an attachment on the ground that the complaint does not state a cause of action should be granted only if the complaint shows on its face that the pleader has no cause of action and that the defect cannot be cured by amendment.

2. Pleading ⟹8(11)

The allegation that plaintiff is the owner of described property pleads an ultimate fact good against a general demurrer and this is true although the title is derived from a tax sale.

3. Pleading ⟹8(11), 35

Where an allegation of ownership is independently pleaded and is not expressly based on specific averments it will be treated as an allegation of an ultimate fact, and any statement of steps taken in acquiring title will be considered surplusage unless a weakness is thereby affirmatively revealed.

4. Taxation ⟹739

Where state sought to recover rents, issues and profits taken and retained by taxpayers after the state allegedly became owner of the property, and allegation of ownership by the state was not made dependent upon a recital of steps taken in the perfection of tax title, and no facts were pleaded which were inconsistent with alleged ownership, the complaint stated a cause of action. Revenue and Taxation Code, §§ 3651, 3652.

5. Attachment ⟹4

Under Code of Civil Procedure authorizing issuance of writ of attachment in any action by the State of California for the collection of taxes due or for the collection of any moneys due on any obligation or penalty imposed by law, an attachment was authorized where the state sought to recover rents, issues and profits taken and retained by taxpayers after the state had allegedly become the owner of the property, since the claim of the state was based upon an obligation imposed by law. Code Civ.Proc. § 537, subd. 5; Revenue and Taxation Code, § 3651 et seq.

6. Attachment ⟹4

That state demanded an accounting of rents, issues and profits taken and retained by taxpayers after the state had allegedly become owner of property, in addition to the $40,000 allegedly due, did not preclude the right to an attachment by the state. Code Civ.Proc. § 537, subd. 5; Revenue and Taxation Code, § 3651 et. seq.

7. Attachment ⟹211

It is not necessary in order to support an attachment that the complaint show the entire amount due and it is immaterial, that the prayer is for an accounting.

8. Attachment ⟹211

That the State of California seeking to recover rents, issues and profits taken and retained by taxpayers after the state had allegedly become the owner of the property, alleged on information and belief that $40,000 was due did not preclude the state from having attachment issued. Code Civ.Proc. § 537, subd. 5; Revenue and Taxation Code, § 3651 et. seq.

9. Attachment ⟹8

An attachment is proper although the exact amount due is unknown to the attaching party.

10. Attachment ⚷122(1)

An attachment affidavit may be amended to the same extent as a complaint and a new ground for attachment may be substituted by way of amendment so long as it is based upon the same transaction.

11. Attachment ⚷122(1)

Where State of California sought to recover the rents, issues and profits taken and retained by taxpayers after the state had allegedly become the owner of the property and an attachment was issued and the several affidavits related to the same transaction and the last affidavit was based upon the proper theory, it was sufficient to support the writ. Code Civ.Proc. § 537, subd. 5; Revenue and Taxation Code, § 3651 et seq.

12. Attachment ⚷125

Where State of California sought to recover rents, issues and profits taken and retained by taxpayers after the state had allegedly become the owner of the property, and the state's cross-complaint prayed for costs of suit the taxpayers were not prejudiced by the failure to mention costs in affidavit for attachment. Code Civ.Proc. §§ 540, 1032.

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Carlyle Miller, Aptos, for appellants.

Fred N. Howser, Attorney General, and E. G. Benard, Deputy Attorney General, for respondent.

GIBSON, Chief Justice.

In an action brought by appellants under the Revenue and Taxation Code, §§ 3618–3638, to contest the validity of certain tax deeds, respondent State of California cross-complained seeking to recover the rents, issues and profits taken and retained by appellants after respondent allegedly became the owner of the property. Appellants moved to discharge a writ of attachment issued on the cross-complaint, and they have appealed from an order denying that motion. In support of their contention that the attachment should have been dissolved, appellants claim that the cross-complaint does not state a cause of action, that an attachment does not lie in this type of case, that the affidavit is defective, and that the writ of attachment was improperly issued.

Respondent's cross-action was brought pursuant to sections 3651 and 3652 of the Revenue and Taxation Code, which confer upon the State of California the exclusive power to rent tax-deeded property and to receive all proceeds arising in any manner therefrom and which authorize the exaction of an accounting of such proceeds from the former owner of the property.

It is alleged in the cross-complaint that the properties in question were conveyed to the State of California for the nonpayment of delinquent tax assessments, that the deeds were recorded on specific dates in the office of the County Recorder of Santa Cruz County, and that at all times subsequent to the recording the state was and now is the owner of the described property. It is further alleged on information and belief that the value of the rents, issues and profits taken by cross-defendants (appellants) is the sum of $40,000. Judgment is prayed for the sum of $40,000, for "an accounting of all rents, issues and profits" received by appellants, and for costs.

[1] Appellants' contention that the cross-complaint does not state a cause of action was first raised on demurrer which was overruled, and it was repeated in the motion to dissolve the attachment which was denied. A motion to discharge an attachment on the ground that the complaint does not state a cause of action should be granted only if the complaint shows on its face that the pleader has no cause of action and the defect cannot be cured by amendment. Force v. Hart, 205 Cal. 670, 672, 272 P. 583. The cross-complaint is said by appellants to be defective because it does not specifically set forth the steps taken in the perfection of the tax title. The claimed defect is one of omission, and there is nothing on the face of the cross-complaint which shows that the asserted fault could not be cured by amendment.

[2] Furthermore, it does not appear that respondent has failed to allege any essential element necessary to the state-

ment of a cause of action. The allegation that respondent is the owner of the described property pleads an ultimate fact, good against a general demurrer, Robinson v. City of Glendale, 182 Cal. 211, 187 P. 741, and this is true although the title is derived from a tax sale. Smart v. Peek, 213 Cal. 452, 2 P.2d 380; Tilton v. Russek, 171 Cal. 731, 154 P. 860; Cole v. Segraves, 88 Cal. 103, 25 P. 1109.

Appellant relies on the early case of Russell v. Mann, 22 Cal. 131. The defendant there, basing his claim of ownership on a tax title, alleged in detail the steps leading up to the sale of a quartz mill, but failed to allege by whom and the year in which the tax was imposed. A judgment of dismissal following the sustaining of a general demurrer was affirmed on appeal, the court stating that whenever a tax title is "specially" set forth in a pleading it is necessary that every fact should be averred which is requisite to show compliance with all of the statutory provisions. The pleading is not quoted in the opinion, but it appears from an examination of the record that the pleader alleged the steps taken in obtaining the tax deed and concluded that "by virtue of" such steps he became owner of the property in question. The case is, therefore, authority for the proposition that where an allegation of ownership is expressly predicated upon a detailed statement of preliminary steps taken in obtaining title, such allegation must find full support in the specific facts pleaded. This rule is based on the reasoning that where the pleader specifies the different acts taken to acquire title, and alleges that by virtue of those acts he became the owner of the property, the allegation of ownership is a mere conclusion of law and may be disregarded. Robinson v. City of Glendale, 182 Cal. 211, 187 P. 741; Cheda v. Bodkin, 173 Cal. 7, 12–13, 158 P. 1025; Kidwell v. Ketler, 146 Cal. 12, 17–18, 79 P. 514; Turner v. White, 73 Cal. 299, 14 P. 794.

[3] It has been suggested that this rule is too strict and that it "would hardly receive the considered approval" today that was given it when it was announced in Russell v. Mann, supra, in 1863. Penaat v. Guasco, 84 Cal.App.2d 445, 450–451, 191 P.2d 564. Whether the rule should be relaxed, however, need not be determined in the present case. Although the cross-complaint shows that respondent relies on a tax title, no attempt is made to detail the preliminary steps leading to the tax deed, and the general allegation of ownership is not made dependent upon specific averments of such steps. It is settled that where an allegation of ownership is independently pleaded, and is not expressly predicated on specific averments, it will be treated as an allegation of an ultimate fact, and any statement of steps taken in acquiring title will be considered surplusage unless a weakness is thereby affirmatively revealed. Martin v. Hall, 219 Cal. 334, 338, 26 P.2d 288; Smart v. Peek, 213 Cal. 452, 2 P.2d 380; Cole v. Segraves, 88 Cal. 103, 25 P. 1109.

[4] Since the allegation of ownership in the present case is not made dependent upon a recital of steps taken in the perfection of the tax title, and no facts are pleaded which are inconsistent with ownership, the cross-complaint states a cause of action.

[5] An attachment is permitted in this type of action by paragraph five of section 537 of the Code of Civil Procedure, which provides that the writ may issue "in an action by the State of California or any political subdivision thereof, for the collection of taxes due said State or political subdivision, or for the collection of any moneys due upon any obligation or penalty imposed by law." Respondent's cross-action is based upon an obligation imposed by law. Rev. & Tax. Code, § 3651 et seq.; see People v. Maxfield, 30 Cal.2d 485, 488, 183 P.2d 897, holding that the right of the state to rents, issues and profits from tax-deeded property is not a penalty.

[6-9] The fact that respondent demanded an accounting of the rents, issues and profits, in addition to the $40,000 allegedly due, does not preclude the right to an attachment. It is unnecessary in order to support an attachment that the complaint show the entire amount due, and it is immaterial that the prayer is for an account-

ing. Kohler v. Agassiz, 99 Cal. 9, 16, 33 P. 741; De Leonis v. Etchepare, 120 Cal. 407, 411, 52 P. 718. The further contention that attachment is improper because the $40,000 claim is alleged on information and belief is equally without merit. The language of section 537 does not suggest that the amount owing must be fixed with absolute certainty, and it has been held that an attachment is proper although the exact amount due is unknown to the attaching party. Force v. Hart, 205 Cal. 670, 272 P. 583; Beeson v. Schloss, 183 Cal. 618, 192 P. 292.

[10, 11] The attachment affidavit was amended twice, respondent ultimately changing the alleged claim from one based on a contract to an obligation imposed by law. Appellants contend that the last amended affidavit merely supplemented the earlier ones and that inconsistent facts are alleged necessitating the rejection of all affidavits. An attachment affidavit may be amended to the same extent as a complaint, and a new ground for attachment may be substituted by way of amendment so long as it is based upon the same transaction. Rosenberg v. Bullard, 127 Cal.App. 315, 15 P.2d 870. In the present case the several affidavits relate to the same transaction, the last affidavit superseded the previous ones and, being based upon the proper theory, is sufficient to support the writ.

[12] Appellants complain because the writ was issued on a demand for $40,000 plus costs, whereas the affidavit did not mention costs. However, costs are allowed "of course" in this type of proceeding by section 1032 of the Code of Civil Procedure, and the cross-complaint prayed for costs of suit. Furthermore, section 540 provides that if security is given in lieu of the sheriff's seizure of the property it must be in "an amount sufficient to satisfy such demand against such defendant, besides costs * * *." Appellants were in nowise prejudiced by the failure to mention costs in the affidavit. The cases of Baldwin v. Napa & Sonoma Wine Co., 137 Cal. 646, 70 P. 732; De Leonis v. Etchepare, 120 Cal. 407, 52 P. 718; Murillo v. Toole, 47 Cal.App.2d 725, 118 P.2d 895; and Finch v. McVean, 6 Cal.App. 272, 91 P. 1019, relied upon by appellants, are distinguishable because they involved a variance between the complaint and the affidavit as to the principal sum or interest due.

The order denying the motion to quash the writ of attachment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

34 Cal.2d 614

ESSICK et al. v. CITY OF LOS ANGELES et al.

L. A. 20835.

Supreme Court of California, in Bank.

Jan. 13, 1950.

As Modified on Denial of Rehearing Feb. 8, 1950.

Action by Bryant Essick and others, on behalf of themselves and all others similarly situated, against the City of Los Angeles and others for a judgment declaring void city ordinances relating to issuance of conditional use permits and a resolution granting such permit.

The Superior Court for Los Angeles County, Henry M. Willis, J., entered an order granting defendants' motions to dismiss the action and a judgment of dismissal and plaintiffs appealed.

The Supreme Court, Schauer, J., held that the granting of conditional use permit by resolution rather than ordinance did not violate and was not prohibited by city charter.

Attempted appeal from order dismissed and judgment modified and as modified affirmed.

Prior opinion, 205 P.2d 86.

1. Appeal and error ⇨105

Order granting motions to dismiss action and directing that judgment of dismissal be prepared was not appealable.

2. Municipal corporations ⇨58

The city charter of Los Angeles operates as a limitation and not as a grant of power and should be strictly construed against the limitation.

3. Municipal corporations ⟹122(2)

Court must assume, in absence of attack upon procedure followed in adopting such ordinances, that ordinance providing a zoning plan for city and ordinance amending the first ordinance were submitted to planning commission for consideration before adoption by council in accordance with city charter and were valid as respects adoption procedure.

4. Municipal corporations ⟹621.9

City Council of Los Angeles in granting conditional use permit after adverse recommendation of planning commission was not bound to follow procedure prescribed by city charter for "changing, altering or amending" a zone, since such procedure applies to action affecting entire zone, while "conditional use permit" authorizes a change within rather than of a zone.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Changing, Altering or Amending" and "Conditional Use Permit".

5. Municipal corporations ⟹621.40

The granting of either a use permit or a variance permit is administrative or quasi-judicial rather than legislative action, and may be accomplished by resolution rather than by ordinance without violating city charter provision requiring all legislative power to be exercised by ordinance.

6. Municipal corporations ⟹621.9

Provisions of Los Angeles City Charter relating to a variance did not encompass or prohibit the granting of a permit for conditional use of land in one-family residence zone for cemetery purposes, since a "conditional use permit" is granted for a public or quasi public purpose within terms of zoning plan and not to obviate the practical difficulties, unnecessary hardships or results inconsistent with general purposes of zoning regulations as applied to individual property owners, which must be shown before a "variance" may be granted by zoning administrator.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Conditional Use Permit" and "Variance".

7. Municipal corporations ⟹621.9

A resolution granting a conditional use permit did not constitute the "changing of a zoning ordinance" within provisions of Los Angeles City Charter prescribing the procedure with respect to applications for such changes.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Changing of a Zoning Ordinance".

8. Declaratory judgment ⟹129

Complaint that action of city council in granting a conditional use permit by resolution rather than by ordinance deprived interested land owners of right to vote on the matter under city charter, authorizing a referendum only on ordinances, should be directed at zoning ordinances rather than at administrative action taken by council by resolution authorized by such ordinances and did not show that such resolution was void, particularly in absence of allegation of any attempt to secure a referendum election on resolution granting the permit.

9. Municipal corporations ⟹621.40

Granting by resolution instead of ordinance a permit for conditional use of land in one family residence zone for cemetery purposes after adverse recommendation of planning commission did not violate Los Angeles city charter.

10. Declaratory judgment ⟹385

Where it appeared in action for judgment declaring a resolution granting conditional use permit to be void that action of city council in granting such permit by resolution did not violate city charter as contended by plaintiffs, judgment so declaring and that conditional use permit was valid as against all contentions of plaintiffs at issue in the action should be entered instead of a judgment of dismissal. Code Civ.Proc. § 1061.

Carl W. Barrow, Los Angeles, for appellants.

Morris Lavine, Los Angeles, as amicus curiae on behalf of appellants.

Ray L. Shesebro, City Attorney, Bourke Jones and Roger Arnebergh, Assistant City Attorneys, Los Angeles, Ugene U. Blalock, Harold S. Morrison, Glendale, Towson T. MacLaren, Guy Richards Crump and Ralph W. Evans, Los Angeles, for respondents.

Donald J. Dunne, Los Angeles, as amicus curiae on behalf of respondents.

SCHAUER, Justice.

[1] Plaintiffs appeal from a judgment of dismissal of their action for declaratory relief against the City of Los Angeles, the individual members of the council of such city, and Forest Lawn Company, a corporation (hereinafter termed, respectively, the city, the council, and the company). By such action plaintiffs sought to have declared null and void because allegedly violative of various sections of the city charter certain ordinance provisions and one resolution passed by the council, having to do in general with the granting of "conditional use permits" under the "Comprehensive Zoning Plan" of the city and in particular with the granting of such a permit to the company. For the reasons hereinafter stated, we have concluded that the judgment should be modified in form as hereinafter specified and, as so modified, affirmed. Plaintiffs also attempt to appeal from the court's order granting defendants' motions to dismiss the action; such order, having directed that judgment of dismissal be prepared, is not appealable and the attempted appeal therefrom will be dismissed. (See McColgan v. Jones, Hubbard & Donnell, Inc. (1938), 11 Cal.2d 243, 78 P.2d 1010; 2 Cal.Jur. 156–159.)

The Pleadings.

Plaintiffs in their complaint (first amended) allege as follows: They are qualified voters and electors of the city. Under Ordinance No. 90,500 passed by the council in March, 1946, and known as the Comprehensive Zoning Plan of the city, certain land owned by plaintiffs together with some 486 acres of land owned by the company was designated as falling within the same "continuous and unbroken" R1 One Family Zone. Plaintiffs sue for themselves and "for the benefit of all the other owners of real property within the said R1 One Family Zone." No cemeteries "are to be located within areas so zoned as R1 One Family Zones except that a procedure for the obtaining of a permit for the 'Conditional Use' for cemetery purposes of real property so zoned as an R1 One Family Zone" is established by subsection C of section 12.24 of Ordinance 90,500. In February, 1947, the council "purportedly" passed Ordinance No. 91,503, section 20 of which amends subsection C of section 12.24[1] of

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[1] Section 12.24, after the amendment of subsection C, reads as follows:

"Sec. 12.24—Conditional Uses Permitted by Commission.

"A Location of Permitted Uses—Wherever it is stated in this Article that the following uses may be permitted in a zone after their location is first approved by the Commission, said uses are deemed to be a part of the development of the Master Plan or its objectives and shall conform thereto * * *

"B. Additional Uses Permitted—The Commission, after public hearing, may permit the following uses in zones from which they are prohibited by this Article where such uses are deemed essential or desirable to the public convenience or welfare, and are in harmony with the various elements or objectives of the Master Plan.

"1. Airports or aircraft landing fields.

"2. Cemeteries.

"3. Development of natural resources * * *

"4 Educational institutions.

"5. Governmental enterprises (federal, state and local).

"6. Libraries or museums, public.

"7. Public utilities, public service uses or structures.

"8. Large scale neighborhood housing projects * * *

"9. In the 'A1', and 'A2' and 'RA' Zones, new self-contained communities with town lot subdivision * * *

"C. Procedure

"1. Conditional Use Application—Form and Contents—Applications for the approval of any use referred to in this Section, shall be filed with the Commission * * *

"2. [provisions for notice, and public hearing are set out] * * *

"3. Decision by Commission—The Commission shall make its findings and

Ordinance 90,500. Acting under the provisions of subsection C as so amended, the company thereafter filed with the City Planning Commission an application for a "Conditional Use" for cemetery purposes of its property mentioned above, the commission denied the application, the company appealed to the council, and the council, in March, 1948, "purported" to pass a *resolution* reversing the action of the commission and granting the application of the company. Pursuant "to said resolution * * * the * * * Company has commenced the construction of a cemetery" upon its property, the creation and maintenance of which will diminish the value, use, and enjoyment of real property owned by the other property owners, including plaintiffs, within the same R1 One Family Zone. Section 12.24 of Ordinance 90,500, section 20 of Ordinance 91,503 (amending subsection C of section 12.24), and the resolution granting the company's application are pleaded in full in the complaint, and are averred to be in conflict with certain provisions of the city charter. Plaintiffs allege, finally, that an actual controversy exists between themselves and defendants relating to their legal rights and duties arising out of the resolution and pray that the court declare null and void the resolution and the ordinance provisions pursuant to which it was passed.

Defendants filed motions to dismiss the action on the grounds that (1) the court had no jurisdiction of the subject of the action for the reason that the complaint presented no justiciable controversy, and (2) it was not necessary or proper at that time for the court to make a declaration

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determination in writing within Forty (40) days from the date of filing of an application and shall forthwith transmit a copy thereof to the applicant * * *

"Upon the failure of the Commission to make a determination within the time limit herein specified, it shall lose jurisdiction and applicant may appeal to the City Council as hereafter provided.

"In approving the uses referred to in this section the Commission shall have authority to impose such conditions as are deemed necessary to protect the best interest of the surrounding property or neighborhood and the Master Plan.

"4. Decision Effective—Right of Appeal—The determination of the Commission shall be final on all matters within the jurisdiction under this Section, except that * * * [during a period of ten] days from the date the written determination is made, * * * written appeal therefrom may be taken to the City Council by the applicant or any other person aggrieved by such determination.

"Upon the failure of the Commission to make its determination within the time limit specified in paragraph 3, Subsection C of this section, the applicant may file an appeal with the City Council requesting a determination from that body. Such appeal shall be filed within ten (10) days after the expiration of the time limit within which the Commission may act * * *

"5. Appeal—Contents—The notice of Appeal to the City Council shall be in writing and shall be filed in duplicate with the City Clerk. Such appeal shall set forth specifically wherein such uses are or are not necessary to the development of the Master Plan or its objectives, or essential or desirable to the public convenience or welfare.

"Upon receipt of the appeal, the City Council shall refer it to the Commission and, thereupon, the Commission shall make a report to the City Council disclosing in what respect the application and facts offered in support thereof met or failed to meet the above requirements, or the reason for its failure to act. The City Council may, *by resolution*, affirm, reverse, or modify, in whole or in part, any determination of the Commission, or may grant or deny any appealed application upon which the Commission has failed to act. Before acting on any appeal, the City Council or its Planning Committee must set the matter for hearing giving the same notice of hearing as that provided in paragraph 2, Subsection C of this section.

"A two-thirds (⅔) vote of the whole of the City Council shall be required to reverse, modify or amend any determination of the Commission and a written finding of fact must be made setting forth wherein the Commission's findings were in error.

"A majority vote of the whole of the City Council shall be sufficient to grant an appealed application not acted upon by the Commission within the time limit specified in paragraph 3, Sub-section C of this section." (Italics added.)

or determination of the rights and duties of the parties under the circumstances alleged. See sec. 1061, Code of Civ.Proc. The motions were granted, judgment was entered accordingly, and this appeal followed.

Pertinent Charter Provisions.

At the times material to this litigation, section 97 of the city charter provided that "No *ordinance, order* or *resolution* shall be adopted by the Council authorizing, ordering or involving any of the following enumerated matters, unless and until such *ordinance, order* or *resolution* shall have first been submitted to the City Planning Commission for report and recommendation * * * (c) The creation of districts or zones for the purpose of regulating the use of lands, * * * or the *changing, amending* or *altering* of any such zones, districts or regulations.

"It shall be the duty of the City Planning Commission, within thirty (30) days from the receipt of any such proposed *ordinance, order* or *resolution,* to make and file its report and recommendation thereon with the Council, and should said Planning Commission recommend against the approval of the matter involved, the Council may adopt such *ordinance* only upon a two-thirds vote of the whole of said Council. Should the City Planning Commission recommend approval or fail to make any recommendation within the time mentioned herein, said Council may adopt such *ordinance, order* or *resolution* by a majority vote of the whole Council * * *" (Italics added.)

Section 98[2] of the charter created the office of Zoning Administrator and gave him the power, among other things, to "investigate, hear and determine all applications for variances from the rules, regulations, restrictions and requirements of the zoning ordinances and [to] * * * grant such variances * * * when practical difficulties, unnecessary hardships or results inconsistent with the general purposes of the zoning regulations may result" otherwise. The Administrator's determination "shall be final except that appeals therefrom may be taken to the Board of Zoning Appeals," which by section 99 of the charter was given the power to "affirm, change or modify the * * * determination * * * subject to the same limitations as are placed upon the Zoning Administrator."

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[2] So far as here material section 98 reads as follows: The Zoning Administrator "shall have the following powers and duties, subject, however, to the supervision and direction of the City Planning Commission as to matters of policy:

"(a) He shall have the control of and be responsible for the administration and enforcement of all zoning ordinances.

"(b) He shall investigate all applications of property owners, including lessees, for *changes to zoning ordinances* and make his report thereon and his recommendation in respect thereto to the Director of Planning and to the City Planning Commission.

"Upon the receipt of such report and recommendation the City Planning Commission shall consider such applications and may approve or deny the same. If approved, such applications, together with the approval of the Commission, shall be presented to the Council, which may adopt the change in said ordinance by a majority vote. If any such application is denied by the City Planning Commission, its action thereon shall be final, except that applicant may appeal to the Council, which may then adopt such change in said ordinance only by a two-thirds vote of the Council * * *

"(c) Subject to such rules and regulations as the Council may by ordinance prescribe he shall investigate, hear and determine all applications for *variances* from the rules, regulations, restrictions and requirements of the zoning ordinances and shall have power to grant such variances as may be in harmony with the general purpose and intent of said ordinances and in accordance with the general and specific rules therein contained and subject to such conditions and safeguards as he may impose. He shall have authority to grant variances only when practical difficulties, unnecessary hardships or results inconsistent with the general purposes of the zoning regulations may result from the strict and literal interpretation and enforcement of the provisions thereof and before any variance may be granted, it shall appear and the Zoning Administrator shall specify in his findings the facts of each case which shall establish beyond a reasonable doubt:

"(1) That there are exceptional or extraordinary circumstances or conditions applicable to the property involved or to the intended use of the property that do not apply generally to the property or class of uses in the same district or zone;

"(2) That such variance is necessary for the preservation and enjoyment of a substantial property right of the petitioner, possessed by other property in the same zone and vicinity; and

"(3) That the granting of such variance will not be materially detrimental to the public welfare or injurious to the property or improvements in such zone or district in which the property is located, and

"(4) That the granting of such variance will not adversely affect the master plan * * *" (Italics added.)

Plaintiffs contend that the charter has thus "provided for two distinct procedures whereby an owner of real property might obtain relief from onerous zoning restrictions, rules and regulations as they limit him in the use and enjoyment of his property"; that a third procedure, in conflict with the charter, is set forth in subsection C of section 12.24 of Ordinance 90,500, as amended by section 20 of Ordinance 91,503; and that such sections, as well as the council's resolution adopted pursuant thereto, granting the company a conditional use permit, are null and void.

[2] It appears, however, that so far as here material the charter contemplates *three* situations, or means (apparently mutually exclusive since procedure for each is detailed in the charter), under or by which action relative to zoning matters may be taken: (1) The "creation" of zones or "the changing, amending or altering of any such zones" (sec. 97(c)); (2) the "granting of variances" (sec. 98(c); (3) "changes to zoning ordinances" (sec. 98(b). Several problems are thus presented: First, does the granting of "conditional use" permits fall within any of the three situations so designated by the charter? Second, if so, does the procedure laid down by the ordinances attacked by plaintiff comply with charter provisions? Third, if either the granting of conditional use permits or the ordinance procedure is not expressly authorized by the charter, is either or are both forbidden by it? Plaintiffs concede that the charter operates "as a limitation and not a grant of power, and hence should be strictly construed [against the limitation]. The city charter of the city of Los Angeles comes within this rule." (Thille v. Board of Public Works of City of Los Angeles (1928), 82 Cal.App. 187, 189, 255 P. 294, 295; see also West Coast Advertising Co. v. City and County of San Francisco (1939), 14 Cal.2d 516, 522, 95 P.2d 138; City of Oakland v. Williams (1940), 15 Cal.2d 542, 549-550, 103 P.2d 168.) Section 2 of the charter itself provides that "The City of Los Angeles * * * shall have the right and power, subject to the restrictions in this charter contained: * * * (4) To make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this charter * * *" The charter further states, in section 21, that "All *legislative power* of the city except as herein otherwise provided is vested in the Council and shall be exercised by *ordinance*, subject to the power of veto or approval by the Mayor as herein set forth. Other action of the Council may be by *order* or *resolution*, upon motion." (Italics added.)

[3] Plaintiffs have not attacked the procedure followed in the adopting either of Ordinance 90,500—hereinafter sometimes referred to as the Zoning Plan of the city—under which they claim protection, or of Ordinance 91,503 (which amends, or "changes," subsection C of section 12.24 of the Zoning Plan). Consequently we must assume that each of such ordinances was submitted to the planning commission for consideration prior to adoption by the council (charter sections 97(c), 98(b)), and is valid insofar as concerns adoption procedure.

The "Changing, Amending or Altering" of a Zone. (Charter Section 97).

Plaintiffs urge that the granting of a conditional use permit constitutes the "changing, amending or altering" *of a zone* within the meaning of subsection (c) of section 97 of the charter, that therefore the procedural provisions of that section must be followed, and that those provisions require that action by the council granting such a permit after an adverse recommendation by the commission must be by *ordinance* rather than by the resolution authorized by subsection C, as amended, of section 12.24 of the Zoning Plan.

Defendants argue, first, that the granting of a conditional use permit authorizes a change *within*, rather than *of*, a zone; that the "changing, amending or altering" *of* a zone means action affecting the entire zone, such, for example, as the changing of its boundaries or of its classification, as from residential to commercial, etc.; that the use "deemed essential or desirable to the public convenience or welfare" (subsection B of section 12.24 of the Zoning Plan), including cemeteries (as well as airports, schools, libraries, public utilities, etc.), for which a conditional use permit is authorized by the Zoning Plan itself is entirely different in scope, nature, and purpose from the change *of* a zone contemplated by subsection (c) of section 97 of the charter; that, in consequence, the provisions of section 97 do not control the procedure to be followed when a conditional use permit is granted.

[4] Defendants' viewpoint appears sound and is supported by the recent case of Wheeler v. Gregg (1949), 90 Cal.App.2d 348, 203 P.2d 37, 47 (hearing denied), in which the court, in considering the same section 12.24 of the same ordinance (Comprehensive Zoning Plan) here involved, especially "noted that Conditional Use Permits are confined to uses of public concern, such as airports, cemeteries * * *. By the specific terms of the Ordinance such uses are permitted in any zoning district subject only to a finding by the Planning Commission, in the first instance, or the City Council on appeal, that the use is essential or desirable to the public convenience or welfare. The decision to grant a Conditional Use Permit does not create a new zone. It merely affirms as a fact the existence of the circumstances under which the ordinance by its terms prescribes that such permit shall issue."

We hold that the council, in granting a conditional use permit after adverse recommendation by the commission, is not bound to follow the procedural provisions of charter section 97.

[5] It should be borne in mind throughout our discussion that the granting of either a "use" permit or a "variance" permit is administrative or quasi-judicial, rather than legislative, action, (see Johnston v. Board of Supervisors (1947), 31 Cal.2d 66, 73–74, 187 P.2d 686; Wheeler v. Gregg (1949), supra, 90 Cal.App.2d 348, 203 P.2d 37; North Side Property Owners' Ass'n v. Hillside Memorial Park (1945), 70 Cal.App.2d 609, 616, 161 P.2d 618) and may be accomplished by resolution rather than by ordinance without violating charter section 21, quoted hereinabove.

The Granting of a "Variance"

(Charter Section 98, subsection (c)).

Defendants contend that a conditional use is a separate and distinct concept from a variance and, as revealed by the Zoning Plan (section 12.24, subsection B), is granted for a public or quasi-public purpose *within* the terms of the Zoning Plan or ordinance itself rather than to obviate the "practical difficulties, unnecessary hardships or results inconsistent with the general purposes of the zoning regulations" as applied to individual property owners, which must be shown before a variance may be granted by the Zoning Administrator (charter section 98, subsection (c)).

[6] We are satisfied that defendants are correct on this point. Aside from the difference in language between the variance provisions of the charter and the conditional use provisions of the Zoning Plan, which indicates the difference in character of the purposes sought to be accomplished, the case of Johnston v. Board of Supervisors (1947), supra, 31 Cal.2d 66, 73, 187 P.2d 686, recognizes that a "use permit" and a "variance" are not the same and at least suggests that the granting of the latter involves a "broader power" than does the granting of a use permit. Also, Wheeler v. Gregg (1949), supra, 90 Cal.App.2d 348, 203 P.2d 37, makes the distinction with respect to the same Los Angeles ordi-

nance which we are considering here. (See also Thomson v. Tafel (1949), 309 Ky. 753, 218 S.W.2d 977, 981; Illinois Bell Telephone Co. v. Fox (1949), 402 Ill. 617, 85 N.E.2d 43, 50.) It therefore appears that the variance provisions of charter section 98 neither encompass nor prohibit the granting of the conditional use here in controversy.

Changes to Zoning Ordinances (Charter Section 98, subsection (b)).

[7] As already noted, plaintiffs do not complain that the procedure followed in adopting Ordinance 91,503 (which amends subsection C of section 12.24 of the Comprehensive Zoning Plan ordinance) did not conform to charter provisions, and it is clear that a resolution performing the administrative act of granting a conditional use permit, as authorized by amended subsection C of section 12.24, does not constitute the "changing of a zoning ordinance," and does not violate the provisions of charter section 98, subsection (b).

Right to Referendum.

[8] Plaintiffs further assert that the charter (sections 281, 282) authorizes a referendum only on ordinances, and complain that the action of the council in granting the conditional use permit to defendants by resolution rather than by ordinance deprives plaintiffs of their right to vote, which is precious and to be zealously guarded. It is our view, however, that plaintiffs' claim to vote upon the matter, whether by initiative (charter sections 272–276) or by referendum, should properly be directed at the Zoning Plan itself (Ordinance 90,500), or at Ordinance 91,503, which amended subsection C of section 12.24 of the Zoning Plan, rather than at administrative action taken by the council by the resolution authorized by such amendment. Plaintiffs apparently do not contend that the granting of a use permit by the commission itself, or pursuant to a proposed council resolution which the commission has approved, would infringe upon their suffrage rights, but base their complaint entirely upon the situation where, as here, the council acts against the recommendation of the commission. Moreover, plaintiffs have alleged no attempt to secure a referendum election on the resolution granting the use permit here involved. Plaintiffs' position on this point is without merit.

[9, 10] We hold that the granting of the conditional use permit to defendant did not violate and was not prohibited by the charter. However, as was held in Maguire v. Hibernia S. & L. Soc. (1944), 23 Cal.2d 719, 728–731, 146 P.2d 673, 151 A.L.R. 1062 (see also Columbia Pictures Corp. v. Detoth (1945), 26 Cal.2d 753, 760, 161 P.2d 217, 162 A.L.R. 747), rather than a judgment of dismissal the trial court should have entered its judgment decreeing expressly (as is implied by the judgment of dismissal) that the plaintiffs are not entitled to the declarations in their favor, which they seek. Accordingly, the judgment of the trial court is modified by: (A) Striking therefrom the words reading "the plaintiffs take nothing by this action and that the same is hereby dismissed," and inserting in lieu thereof the words: "the resolution adopted in March, 1948, by The Council of the City of Los Angeles, granting the application of the defendant Forest Lawn Company, a corporation, for a conditional use permit for cemetery purposes, and applying to that certain land owned by the defendant corporation and more particularly described in plaintiffs' complaint, is not null and void, and does not violate and is not prohibited by the charter of the City of Los Angeles; and that the conditional use permit issued pursuant to such resolution is valid as against all contentions of plaintiffs at issue in this suit"; and (B) striking from the final paragraph of such judgment of the trial court the words "of dismissal."

As so modified the judgment of the trial court is affirmed, respondents to recover their costs. The attempted appeal from the court's order granting defendants' motion to dismiss is itself dismissed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

95 Cal.App.2d 644

DOWD v. BRYCE et al.

Civ. 3979.

District Court of Appeal, Fourth District, California.

Jan. 19, 1950.

Rehearing Denied Feb. 10, 1950.

Hearing Denied March 16, 1950.

Action by R. H. Dowd against J. E. Bryce and others for a declaration of rights and duties of the parties to an agreement for sale of a business and real estate.

The Superior Court of San Diego County, L. N. Turrentine, J., rendered judgment for defendants and plaintiff appealed.

The District Court of Appeal, Griffin, Acting P. J., held that leasing of realty by plaintiff vendor to a party for purpose of conducting a competitive business would violate an agreement not to compete.

Judgment affirmed.

1. Contracts ⚷202(2)

Intent of parties as to extent of prohibition to compete, contained in agreement for sale of store and realty was to be arrived at, by reading the pertinent paragraph in the contract and by using the whole paragraph irrespective of whether part of it was a violation of restraint on alienation. Civ.Code, § 711.

2. Contracts ⚷202(2)

Under clause not to compete in contract for sale of store and realty wherein vendors agreed not to "directly or indirectly compete" nor to "sell" land within restricted area to a party contemplating business of same nature, clause was intended as a general restriction and vendors were prohibited from leasing land within restricted territory knowing at time of lease that it would be used for purpose of competition.

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Whelan & Whelan, San Diego, for appellant.

Treadwell & Griffin, San Diego, for respondents.

GRIFFIN, Acting Presiding Justice.

This is an action for declaratory relief and to make a declaration of the rights and duties of the parties to a certain "Agreement for Sale of Business and Real Estate." The three Dowd brothers, who were engaged in the business of operating a grocery store, fruit and vegetable market and liquor store, on December 5, 1944, sold to defendants, all their right, title and interest in those "businesses, the Good Will therein * * * as going concerns," and the real property, stock in trade, accounts, benefits and advantages which they were entitled to in respect to said trades or businesses. Subsequent to the execution of the above-mentioned agreement the Dowd Brothers sold all of their interest in the property herein involved to plaintiff R. H. Dowd. The plot of land was on Midway Drive, in San Diego. Part of this plot was occupied by the store buildings above mentioned, and a second section of the plot now owned by plaintiff, which adjoins the property sold but was not included in the sale, was entirely unoccupied. For the protection of the defendant purchasers, paragraph IV of the agreement was inserted and is the one in question. It provides: "The sellers agree that they will not, for the period of ten years from the date of this Agreement, directly or indirectly, engage in similar businesses to the ones involved in this Agreement, within a radius of two miles of this property, nor knowingly, to sell any land within these same limits to a purchaser contemplating businesses of the same nature * * *."

A further provision was inserted in the contract providing for damages in the sum of $15,000 should this provision be violated by the sellers. Paragraph VI of the agreement provides that the sellers "have now in themselves good right to assign the Good Will, stock in trade, fixtures and effects, * * * that they, the Sellers, shall not, either by themselves or with any other person or persons, do or cause to be done, any wilful act or thing to the prejudice of the said trades or businesses set forth above, as heretofore carried on and conducted by the Sellers * * *." The whole contract consists of five typewritten pages, which was prepared by the buyers.

The particular question presented to the trial court was whether the obligation of the seller under the contract would be violated by plaintiff making a present *lease* of the parcel of real property now owned by plaintiff within the two-mile radius to a lessee who admittedly intends to operate thereon an off-sale liquor store. It was stipulated at the trial and the court found that the lease which plaintiff desired to give was and is a bona fide lease to a third person. By its decree it determined that if the plaintiff knowingly gives such a lease, within the period of ten years from the date of the agreement, of the plot of real property in question it would, on the part of the plaintiff, be indirectly engaging in the business of a licensed off-sale liquor store and thereby would be in violation of the obligations of the seller in said agreement not to engage indirectly in such a similar business.

Plaintiff attacks this portion of the decree and claims that this case is not one of fraudulent evasion such as the cases of Akers v. Rappe, 30 Cal.App. 290, 158 P. 129; Barrager v. Walls, 62 Cal.App. 472, 216 P. 995; and Merager v. Turnbull, 2 Wash.2d 711, 99 P.2d 434, 127 A.L.R. 1142. He argues that a different rule applies where the vendor acts in good faith, and cites such cases as Meyers v. Merillon, 118 Cal. 352, 357, 50 P. 662; Carr v. King, 24 Cal.App. 713, 142 P. 131; Test Oil Co. v. La Tourette, 19 Okl. 214, 91 P. 1025; Ericson v. Jayette, 149 Fla. 82, 5 So.2d 453; California Linoleum & Shades Supplies, Inc., v. Schultz, 105 Cal.App. 471, 287 P. 980; McKeighan Wachter Co. v. Swanson, 138 Wash. 682, 245 P. 10; Postal Telegraph Cable Co. v. Western Union Telegraph Co., 155 Ill. 335; 40 N.E. 587; Sylvester v. Hotel Pasco et al., 153 Wash. 175, 279 P. 566; Brigg v. Thornton, 1 Chancery 386; Hebert v. Dupaty, 42 La.Ann. 343, 7 So. 580; Diller v. Schindler, 88 Cal. App. 250, 252, 263 P. 277; Gallup Electric Light Co. v. Pacific Improvement Co., 16 N.M. 86, 113 P. 848; and Hunts Point Restaurant v. Oval Foods, 153 Misc. 451, 274 N.Y.S. 450, 453.

Defendants contend that the word "sell" mentioned in the paragraph under discussion encompassed the word "lease". The trial court was of the belief that the clause "* * * nor knowingly, to sell any land within these same limits to a purchaser contemplating businesses of the same nature," was inoperative as a violation of section 711 of the Civil Code. However, it held that the paragraph under discussion prevented plaintiff from knowingly leasing this property to another for the purpose of engaging in the sale of liquor in competition with defendants. In support of the correctness of this ruling, defendants cite Whitney v. Slayton, 40 Me. 224; Parnell v. Dean, 31 Ont.R. 517; 30 C.J.S., Enforceable, p. 245; Attorney General v. New York, New Haven & Hartford Railroad Co., 198 Mass. 413, 84 N.E. 737; Amicable Life Insurance Co. v. O'Reilly, Tex.Civ. App., 97 S.W.2d 246, 249 [Rehearing denied]; and Guerand v. Dandelet, 32 Md. 561, 3 Am.Rep. 164.

[1, 2] As to the intent of the parties, that fact must be arrived at by reading the pertinent paragraph in the contract, and that whole paragraph should be used in arriving at the intent, even though a part of it may have been, in itself, a violation of the restraint on alienation. It is rather clear from the terms of the agreement that there was intended a general restriction on the seller as to any acts which would promote competition, and that it was not the intention of the parties that an exception might be made and the seller allowed to knowingly lease his piece of property for the purpose of competition.

A reading of the authorities cited bring us to the conclusion that the trial judge correctly interpreted the intent expressed in the written instrument to be construed when he said: "When a seller lawfully agrees not to directly or indirectly compete with his buyer, he may be said to be indirectly competing when he leases his land within the restricted territory for a consideration, knowing at the time of the lease that it is to be and will be used for the same kind of business which his purchaser bought from him in competition with the purchaser. This is for the reason that he has control of the opportunity to compete and desires a profit therefor in the form of rental for his lease, as his lessee can only pay rent out of the profits made in competing with the purchaser from his lessor."

Therefore, Dowd, by his very act of leasing to a party whom he knows is going to compete, under the circumstances related, would be considered guilty of bad faith. By his very act of leasing he creates competition. His act is one link in the chain which creates the very competition which it was the object of the clause in question to prevent.

Judgment affirmed.

MUSSELL, J., concurs.

Hearing denied; EDMONDS, SCHAUER, and SPENCE, JJ., dissenting.

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95 Cal.App.2d 595

PEOPLE v. DONNELLY.

Cr. 683.

District Court of Appeal, Fourth District, California.

Jan. 16, 1950.

Mark M. Donnelly was convicted in the Superior Court of Riverside County, O. K. Morton, J., of manslaughter committed while driving a vehicle in the commission of an unlawful act not amounting to a felony with gross negligence and from the judgment, and order denying a new trial and a claimed order denying a motion in arrest of judgment, he appealed.

The District Court of Appeal, Griffin, P. J., held that testimony of another motorist as to speed of defendants' automobile was competent and that the evidence sustained conviction.

Appeal from order denying motion in arrest of judgment dismissed and judgment and order denying a new trial affirmed.

1. Criminal law 🔑461, 741(4)

Testimony of motorist as to speed of another automobile which he had observed approaching from the rear, passing him and skidding to a stop was competent, the weight to be given such evidence being for the trier of fact.

2. Automobiles 🔑355(13)

In prosecution for manslaughter committed while driving a vehicle in the commission of an unlawful act not amounting to a felony with gross negligence, evidence warranted finding that defendant was driving at excessive speed and deliberately crossed the white line in center of four-lane highway to pass on its left an automobile, which was proceeding in the same direction and attempting to make a left turn, or that he was driving so fast that he lost control of automobile and skidded into truck proceeding in the same direction. Pen.Code, § 192.

3. Jury 🔑29(2)

Accused may waive the right to a jury trial.

4. Criminal law 🔑662(8)

The right to be confronted by witnesses against him is a personal privilege which may be waived by accused and such waiver is accomplished when counsel for accused stipulates that the evidence taken at preliminary examination may be considered by the court as evidence at the trial.

5. Criminal law 🔑662(8)
Jury 🔑29(6)

Where defendant charged with manslaughter was represented by counsel, was present when stipulation was made that case be submitted on the testimony there adduced and testimony taken at preliminary examination and personally waived a jury trial and principal witness against defendant was sworn, examined and fully cross-examined at trial, no error resulted.

6. Criminal law 🔑317

Defendant's failure to testify in his own behalf or present any witnesses in explanation of his actions in relation to the operation of an automobile warranted inference that if defendant had an explanation he would have given it or that if the evidence relating to his operation of automobile were false he would have denied it.

7. Automobiles ⚷355(13)

Evidence that defendant was driving automobile at excessive speed and deliberately crossed white line in center of four-lane highway to pass on its left an automobile, which was proceeding in the same direction and attempting to make a left turn, or that defendant was driving so fast that he lost control of his automobile which skidded into a truck proceeding in the same direction resulting in death of occupants of truck, sustained conviction of manslaughter committed while driving a vehicle in the commission of an unlawful act not amounting to a felony with gross negligence. Pen.Code, § 192.

8. Criminal law ⚷1023(12)

Order denying motion in arrest of judgment was not appealable.

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Willard H. Winder, Riverside, for appellant.

Fred N. Howser, Attorney General, Howard S. Goldin, Deputy Attorney General, William O. Mackey, District Attorney, Riverside, for respondent.

GRIFFIN, Acting Presiding Justice.

Defendant was charged with manslaughter in violation of section 192, Penal Code, in that he did wilfully, unlawfully and without malice, while engaged in the driving of a vehicle in the commission of an unlawful act not amounting to a felony, with gross negligence, produced the death of one Thomas Wood.

In a second count he was similarly charged in producing the death of one Ralph Wood.

The defendant pleaded not guilty on each count, waived trial by jury, and by stipulation by respective counsel the case was submitted on the testimony there adduced and the testimony taken at the preliminary examination. By stipulation the transcript was read into evidence. Pictures and charts used in the preliminary examination were, by stipulation, received in evidence and it was further stipulated that both victims came to their death as a result of the accident between their truck and the car driven by defendant Donnelly. Two witnesses were sworn and examined at the trial and from the record on appeal the facts show that on April 6, 1949, about 2:00 P.M., one DeWitt was operating his Ford car in an easterly direction on a 4-lane highway (No. 99) divided by double white lines, between Beaumont and Banning. He was in the inner left lane and was signaling for a left-hand turn, and was traveling about 25 miles per hour. The Donnelly car (Cadillac) was approaching in the same direction and in the same lane, about 150 to 200 feet behind him. DeWitt gave a left turn signal, slowed down and then gave a signal to stop to make a left turn into a garage. About that time a truck came by him on his right, in the right-hand lane. Donnelly, according to DeWitt, was traveling approximately 55 to 60 miles per hour and crossed over the double center line, passed and went around the DeWitt car on its left and returned into the westbound traffic lane. DeWitt heard screeching brakes. Defendant's car, as it passed DeWitt, made a wide swerve, came back into the right-hand or eastbound portion of the highway and skidded in front of and collided with the truck in which the deceased men were riding and which had just passed the DeWitt car. The truck was in the right-hand eastbound lane and seemed to "go in the air and turned three and a half turns and landed upside down." Donnelly's car skided a distance of 192 feet. The first 50 feet of the marks were from the left wheel and the balance of the distance was from the four wheels. As a result of the collision, the occupants of the truck were killed.

[1] The main argument is that the evidence is insufficient to support the judgment, and much of that argument is contained in the contention that although DeWitt did have an opportunity to observe Donnelly's car he was unable to judge of its speed. He did observe it as it approached his car from the rear, in passing and skidding by him, in traveling the distance it took defendant to stop and the length of the skid marks. It is argued that these facts were insufficient for De-

Witt to base any estimate of the rate of speed of defendant's car at the time. Defendant never controverted these facts or the estimate given by DeWitt as to the speed of his car. The evidence introduced was competent. The weight to be given thereto was for the trial court to determine from all the facts. Hastings v. Serleto, 61 Cal.App.2d 672, 690, 143 P.2d 956; Dilger v. Whittier, 33 Cal.App. 15, 18, 164 P. 49; Shropshire v. Pickwick Stages, 85 Cal.App. 216, 223, 258 P. 1107; Fortier v. Hogan, 115 Cal.App. 50, 1 P.2d 23.

[2] There is ample evidence to support the conclusion that defendant's vehicle was being driven by him at an excessive rate of speed and that defendant deliberately crossed the white line to pass the DeWitt car on his left, or that the defendant was driving so fast that he lost control of his car.

The next complaint is that this court should disapprove of the practice of defendants waiving jury trial and submitting the prosecution of the case on the transcript of the preliminary examination, citing People v. Stinchcomb, 92 Cal App.2d 741, 208 P.2d 396.

[3, 4] The waiver of the right to a jury trial is permissible. Moreover, it has been held that the right to be confronted by the witnesses against him is a personal privilege which may be waived by the accused, and such a waiver is accomplished when counsel for defendant stipulates that the evidence taken at the preliminary examination may be considered by the court as evidence at the trial. People v. Tanner, 77 Cal.App.2d 181, 188, 175 P.2d 26; People v. Cohen, 94 Cal.App.2d 451, 210 P.2d 911.

[5–7] In the instant case defendant was represented by counsel, was present when the stipulation was made, personally waived a jury trial, and the main witness, DeWitt, was sworn, examined and fully cross-examined at the trial. No error resulted. Defendant did not take the witness stand himself nor present any witnesses in explanation of his actions. It may be inferred from the evidence here presented that if defendant had an explanation he would have given it, or that if the evidence were false he would have denied it. People v. Adamson, 27 Cal.2d 478, 489, 165 P.2d 3; People v. Dozier, 35 Cal.App.2d 49, 59, 94 P.2d 598. There is ample evidence to support the judgment of the trial court. People v. Rodgers, 94 Cal.App.2d 166, 210 P.2d 71.

[8] Although defendant attempted to appeal from a claimed order denying a motion in arrest of judgment, the record does not disclose such an order. However, it is not an appealable order, and the attempted appeal therefrom is dismissed. People v. Okada, 14 Cal.App.2d 660, 664, 58 P.2d 967.

Judgment and order affirmed.

MUSSELL, J., concurs.

CITY & COUNTY OF SAN FRANCISCO v. SAN MATEO COUNTY.

Civ. 13915.

District Court of Appeal, First District, Division 1, California.

Jan. 17, 1950.

Hearing Granted March 16, 1950.*

The City and County of San Francisco brought an action against the County of San Mateo to recover real property taxes paid under protest.

The Superior Court for Marin County, Edward I. Butler, J., rendered a judgment for defendant, and plaintiff appealed.

The District Court of Appeal, Peters, P.J., held that plaintiff, who was contesting the validity of an assessment levied on property claimed exempt from taxation, could bring a suit to recover taxes paid under protest without first seeking review by the State Board of Equalization. The court also held that a dirt fill placed on marsh land at plaintiff's airport located in San Mateo county was an improvement, and hence was exempt from taxation by defendant.

Judgment reversed.

1. Administrative law and procedure ⇨229

Where an administrative remedy is provided by statute, relief must be sought from the administrative body; and this remedy must be exhausted before the courts will act.

2. Administrative law and procedure ⇨229
Taxation ⇨449(1), 450(1), 453

Questions of valuation are the only matters properly brought before a board of equalization whether state or county; and where taxpayer complains of an overvaluation of his property, he must first seek relief from board of equalization before applying to the courts. Revenue and Taxation Code, § 1831; Const. art. 13, § 9.

3. Administrative law and procedure ⇨229
Taxation ⇨251

Requirement that administrative remedy must be pursued before recourse may be had to courts in tax overvaluation cases does not exist where exempt property has been assessed.

4. Taxation ⇨497

Where taxpayer complains of assessment of exempt property, and relief is denied by county board of supervisors acting as board of equalization, taxpayer can bring a writ of mandamus against board to compel cancellation of the assessment. Revenue and Taxation Code, §§ 1831, 4986–4994; Const. art. 13, §§ 1, 9.

5. Taxation ⇨251

A governmental taxpayer may have injunctive relief against a tax collector seeking to collect taxes levied upon exempt property. Revenue and Taxation Code, § 1831; Const. art. 13, §§ 1, 9.

6. Pleading ⇨214(1)

On demurrer, allegations of complaint must be regarded as true.

7. Administrative law and procedure ⇨229
Taxation ⇨251

Where a county, city and county, or municipal corporation as taxpayer contests validity of an assessment levied upon property claimed exempt from taxation under the constitution, municipality may pay taxes under protest and then bring suit to recover without first seeking review by the state board of equalization. Revenue and Taxation Code, §§ 1831, 4986–4994, 5096–5102; Const. art. 13, §§ 1, 9.

8. Constitutional law ⇨14
Statutes ⇨181(2), 184, 188

In construing a statute or constitution, while ordinary words should be given a natural and ordinary meaning, words may be enlarged to effectuate the obvious purpose of the statute; and where word of common usage has more than one meaning, the one which will best attain purposes of the statute should be adopted even though ordinary meaning is thereby enlarged or restricted, especially to avoid absurdity or to prevent injustice.

9. Taxation ⇨217

Purpose of provision of the constitution that land and improvements which are located outside county, city and county, or municipal corporations, and which are taxable at time of acquisition, shall not be exempt from taxation, except that no improvements of any character constructed by the municipality shall be taxed, is to protect against loss of taxable property in counties in which municipalities acquire property for operation of municipal projects, but acquired land is to remain on tax rolls at value it bore at time of acquisition. Const. art. 13, § 1.

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* Subsequent opinion 222 P.2d 860.

10. Constitutional law ⚿19

In determining intention of framers of amendment to the constitution, court may look to argument presented to the voters on its submission.

11. Taxation ⚿217

Under provision of the constitution that lands and improvements which are located outside municipality and which are taxable at time of acquisition by a municipality, shall not be exempt, except that no "improvements" of any character constructed by a purchasing municipality shall be taxed, quoted term included dirt fill placed on marsh land by city and county of San Francisco at its airport located in San Mateo County. Revenue and Taxation Code, § 105(a); Const. art. 13, § 1.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Improvements".

12. Taxation ⚿251, 441

Where city and county of San Francisco seeking to recover taxes paid under protest on ground that they were assessed against exempt property alleged that due to invalid portion of the assessment, property was appraised to extent of 588% more than appraisement which was proper, correct appraisal value could be determined by mathematical computation, and entire assessment would not be declared illegal because part was valid and part void. Revenue and Taxation Code, § 5141; Const. art. 13, § 1.

13. Taxation ⚿441

The statute providing that if court finds assessment is void in whole or in part, court shall render judgment for plaintiff for amount of taxes paid on part of assessment found to be void and remainder shall constitute valid taxes, indicates clear intention that when void portion of assessment can be separated from valid portion, so much of the assessment as is valid should be upheld. Revenue and Taxation Code, § 5141.

Dion R. Holm, City Attorney of the City and County of San Francisco, A. Dal Thomson, Public Utilities Counsel of the City and County of San Francisco, San Francisco, attorneys for appellant.

Louis B. Dematteis, District Attorney of San Mateo County, John A. Bruning, Assistant District Attorney of San Mateo County, Keith Sorensen, Civil Deputy District Attorney of San Mateo County, A. S. Whitmore, Associate Counsel, Redwood City, attorneys for respondent.

PETERS, Presiding Justice.

The City and County of San Francisco filed this action to recover 1946–1947 real property taxes paid under protest to the County of San Mateo. The demurrer of the County was sustained, without leave to amend, on the ground that the complaint failed to state a cause of action. From the judgment based on that order this appeal is taken.

Since 1930, San Francisco has owned an area of land known as the San Francisco Airport, located in San Mateo County. Over the years additional adjacent lands have been acquired by appellant for the purpose of expansion. A large portion of this land was marsh, tidal and submerged land which had to be filled, in order to be utilized for airport purposes. The complaint alleges that appellant, prior to March, 1946, expended the sum of $6,753,529.00 in filling this area, and in providing for drainage; that San Mateo County has refused to recognize these operations as tax exempt improvements under Section 1, Artice XIII of the California Constitution, and accordingly, in assessing the value of the realty as of the first Monday in March, 1946, included the increased value of the property caused solely by the dirt fill; that on December 5, 1946, appellant paid as the first installment of the taxes so assessed, the sum of $14,084.84; that on April 17, 1947, a second installment of $14,084.98 was paid; that both payments were made under protest. The protest reads, in part, as follows:

"The ground of protest against the assessments * * * is that the assessed values used by the Assessor of San Mateo County, in determining the amount of taxes herein referred to, represent an unreasonable and illegal increase over the assessed values used by said Assessor in determining the amount of taxes on the same properties for the fiscal year 1943–1944 and previous fiscal years; and the amount of said taxes is excessive, unreasonable, illegally determined, and confiscatory.

"It is not claimed that the whole of the assessments levied against the properties owned by the City and named in the tax bills hereinafter listed is illegally assessed; illegality is claimed only as to such portion of said assessments as are based on the improvements the City made to said properties in the way of filling the land to make it adaptable and useful for the conduct of an airport. In the fiscal year 1943–1944 the lands of City for which this protest is made were assessed in the sum of $100,785.00 and for the fiscal year 1946-1947 the self-same lands were assessed at the sum of $684,625.00. That all of the increased assessments are based solely upon the improvements made by City to the land that was formerly marsh area or wholly submerged lands, and without regard to the value of other lands owned by others than the City and which lands are contiguous or adjacent to the lands of City. That the action of the Assessor in so assessing City lands is contrary to and violates Section 1 of Article XIII of the Constitution."

The complaint asked judgment for the amount of the taxes paid upon the "improvements" plus 5 per cent interest from the dates of payment.

The principal grounds of the demurrer were that appellant failed to make application to the State Board of Equalization for the review, equalization and adjustment of the valuations and assessments in accordance with Section 1, Article XIII of the Constitution; and that whether or not the amount of said taxes was excessive, unreasonable, illegally determined, or confiscatory was purely a question of equalization, and appellant must first exhaust its administrative remedy. The second basic contention of respondent was that the fill of dirt by dredging and dry-fill operations upon the land did not constitute an "improvement" within the meaning of the constitutional section.

Section 1, Article XIII of the Constitution provides, in part, as follows: "All property in the State except as otherwise in this Constitution provided * * * shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. The word 'property,' as used in this article and section, is hereby declared to include * * * all other matters and things, real, personal, and mixed, capable of private ownership; * * * provided, that property * * * as may belong to this State, or to any county, city and county, or municipal corporation within this State shall be exempt from taxation, except such lands and the improvements thereon located outside of the county, city and county or municipal corporation owning the same as were subject to taxation at the time of the acquisition of the same by said county, city and county, or municipal corporation; provided, that no improvements of any character whatever constructed by any county, city and county or municipal corporation shall be subject to taxation. All lands or improvements thereon, belonging to any county, city and county or municipal corporation, not exempt from taxation, shall be assessed by the the assessor of the county, city and county or municipal corporation in which said lands or improvements are located, and said assessment shall be subject to review, equalization and adjustment by the State Board of Equalization."

[1] The first question to be determined is whether appellant failed to exhaust its administrative remedies and should therefore be barred from judicial relief. It will be noted that the last portion of the quotation from the Constitutional provision provides that, except as to property "not exempt from taxation," the "assessment shall be subject to review, equalization and adjustment by the State Board of Equalization." If appellant was required to fol-

low this procedure, its present action must fail. "* * * the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." Abelleira v. District Court of Appeal, 17 Cal.2d 280, 292, 109 P.2d 942, 949, 132 A.L.R. 715; see, also, United States v. Superior Court, 19 Cal.2d 189, 194, 120 P.2d 26; People v. Keith Railway Equipment Co., 70 Cal.App. 2d 339, 346, 161 P.2d 244.

[2] The function of the State Board of Equalization is "to equalize the valuation of the taxable property in the several counties of the State for the purposes of taxation." Section 9, Art. XIII, California Constitution. "* * * it shall equalize the assessment of property as prescribed by law." Section 1831, Revenue and Taxation Code. Questions of valuation are the only matters properly brought before a board of equalization, whether State or County (see Judicial Review of Determinations by County Boards of Equalization, by W. Sumner Holbrook, Jr., 14 So. Cal.L.Rev. 276, 277), and it is well settled that where the taxpayer complains of an overvaluation of his property he must first seek relief from the Board of Equalization before applying to the courts. Dawson v. County of Los Angeles, 15 Cal.2d 77, 81, 98 P.2d 495; Associated Oil Co. v. County of Orange, 4 Cal.App.2d 5, 7, 40 P.2d 887; Montgomery Ward & Co. v. Welch, 17 Cal. App.2d 127, 131, 61 P.2d 790.

[3-5] Since 1911, however, our courts have recognized that there is a distinction between "the mere overvaluation of property in an assessment thereof, and the inclusion in such an assessment of property not taxable at all". Brenner v. Los Angeles, 160 Cal. 72, 76, 116 P. 397, 399; see, also, Luce v. City of San Diego, 198 Cal. 405, 406, 245 P. 196; Associated Oil Co. v. County of Orange, supra, 4 Cal.App.2d at page 9, 40 P.2d at page 889; Los Angeles Shipbuilding & Dry Dock Corp. v. Los Angeles County, 22 Cal.App.2d 418, 422, 71 P.2d 282. While the courts have uniformly held that the administrative remedy must be pursued before recourse may be had to the courts in overvaluation cases, no such requirement exists in the case where exempt property has been assessed. In the latter situation, the taxpayer has a choice of remedies, several of which have been used by county, city and county, and municipal corporation taxpayers. One of the most common practices has been for them to proceed under old section 3804 of the Political Code, now found generally in sections 4986-4994 of the Revenue and Taxation Code, and petition the county board of supervisors, acting as a board of equalization, to cancel the assessment. If relief is there denied, the taxpayer may then bring a writ of mandamus against the board to compel cancellation of the assessment. Glenn-Colusa Irr. Dist. v. Ohrt, 31 Cal.App.2d 619, 88 P.2d 763; People v. Board of Supervisors, 126 Cal.App. 670, 15 P.2d 209; City of Los Angeles v. Board of Supervisors, 108 Cal. App. 655, 292 P. 539. A prior application to the Board is even then not always a prerequisite to an application for the writ. State Land Settlement Board v. Henderson, 197 Cal. 470, 241 P. 560. The governmental taxpayer has also been allowed injunctive relief against a tax collector seeking to collect taxes levied upon exempt property. Turlock Irr. Dist. v. White, 186 Cal. 183, 198 P. 1060, 17 A.L.R. 72. These, and several other procedures, appear available both to public and private taxpayers, no distinction being drawn between the two classes. See, 2 Witkin, Summary of California Law, 1220-1227.

The taxpayer also has the privilege of paying the taxes assessed, and then seeking redress in either of two ways. First, he may pay the challenged assessment, and then file a claim with, and seek a refund from, the Board of Supervisors under sections 5096-5102 of the Revenue and Taxation Code. We have been referred to no case where a governmental taxpayer has used this procedure.

Appellant has chosen a second method—a method entirely different from that described above. It has heretofore been held that in certain cases at least either method is permissible. Brill v. County of Los Angeles, 16 Cal.2d 726, 729, 108 P.2d 443; Stewart Law & Collection Co. v. County of Alameda, 142 Cal. 660, 665, 76 P. 481. Under the method chosen in this case, the public taxpayer, like any taxpayer, pays the taxes under protest and then sues to recover the amount paid. Sections 5136–5143, Revenue and Taxation Code. In numerous cases in which the sole or primary issue was whether the property levied upon was exempt, this procedure has been followed and upheld. Rock Creek Water Dist. v. County of Calaveras, 29 Cal.2d 7, 172 P.2d 863; Metropolitan W. Dist. v. County of Riverside, 21 Cal.2d 640, 134 P.2d 249; scribed above. It has heretofore been held City and County of San Francisco v. San Mateo County, 17 Cal.2d 814, 112 P.2d 595; Laguna Beach County Water District v. County of Orange, 30 Cal.App.2d 740, 87 P.2d 46. In none of these cases does the opinion show that the governmental taxpayer first proceeded before the State Board of Equalization. These cases necessarily stand for the proposition that where exempt property is improperly taxed, redress may be had to the courts without first proceeding before the State Board of Equalization. The fact that in the above cases, all of the property assessed was claimed exempt, and that in the instant case only a clearly separable portion of the property is claimed exempt, is not a sufficient distinction to warrant a holding that the procedure there followed cannot be availed of by the taxpayer in the instant case.

[6] It should be pointed out that the pleadings make it clear that appellant is not complaining of an overvaluation of his property by the assessor, but of the inclusion in the assessment of property exempt from taxation. This is of considerable importance. "While in one sense it is true that almost any mistake which results in an excessive assessment amounts to an overvaluation of the property of a taxpayer, we think there is a real and distinct difference between those cases in which it may properly be said that the error is one of overvaluation and those cases in which the overvaluation is a mere incidental result of an erroneous assessment of property which should not have been assessed." Associated Oil Co. v. County of Orange, 4 Cal.App.2d 5, 9, 40 P.2d 887, 889. Appellant concedes that part of the assessment was valid, and complains only of that portion of the assessment which was levied on the property claimed by it to be an improvement, and therefore exempt. It was alleged in the complaint that, on the theory that the dirt fill constituted an improvement, "said Airport real property has been evaluated and appraised by defendant for taxation purposes as of said date to the extent of 588% more than the appraisement which would have been made by the defendants were the improvements by said fill not to be considered." Since the case is before us on demurrer, these allegations must be regarded as true. The effect of the demurrer was to concede that the assessment levied upon the property involved would not have been as great had the value of the dirt fill not been included.

[7] For these reasons, it must be held that when a county, city and county or municipal corporation taxpayer contests the validity of an assessment levied upon property claimed exempt from taxation under Sec. 1, Art. XIII of the Constitution, it may pay the taxes under protest and bring suit to recover without first seeking review by the State Board of Equalization. Such a procedure is permitted by Secs. 5136–5143 of the Revenue and Taxation Code. The constitutional provision requires the taxpayer to seek review by the Board only when the assessed property is "not exempt from taxation". Thus, if appellant's position that the fill is an "improvement" is correct, it is exempt from taxation, and no purpose would be served by first proceeding before the Board.

The next question to be determined is whether the dirt fill constitutes an improvement within the meaning of Sec. 1, Art. XIII of the Constitution.

Both appellant and respondent have relied upon code definitions of the word "improvements," and definitions found in the cases. The definitions are not consistent, and vary according to the purposes of the statutes and the specific questions under consideration by the court or Legislature.

[8] It is a fundamental principle of statutory and constitutional construction that "while ordinary words should be given

their natural and ordinary meaning, they may be enlarged in order to effectuate the obvious purpose of the statute. * * * Similarly, where a word of common usage has more than one meaning, the one which will best attain the purposes of the statute should be adopted, even though the ordinary meaning of the word is thereby enlarged or restricted, and especially in order to avoid absurdity or to prevent injustice." Crawford, The Construction of Statutes, p. 318. Interpreting the very constitutional section before us, the Supreme Court of this state has said: "It is fundamental that the objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in its interpretation." Rock Creek Water Dist. v. County of Calaveras, 29 Cal.2d 7, 9, 172 P.2d 863, 865.

Respondent argues that a dirt fill is not an improvement within the meaning of section 105(a) of the Revenue and Taxation Code, which declares that " 'Improvements' includes: (a) All buildings, structures, fixtures, and fences erected on or affixed to the land, except telephone and telegraph lines." Reliance is placed upon the case of San Pedro, L. A. & S. L. R. Co. v. Los Angeles, 180 Cal. 18, 179 P. 393, in which the court stated that a dirt fill was not an improvement within the meaning of that section. However, the court in that case was called upon to define the meaning of the word only as it was used in that particular code section. It was not called upon to define the word as it is used in the constitutional amendment involved in the case before us. That the word "improvements" as used in the constitutional amendment was intended to have a broader meaning from the same term as used in the statute is demonstrated when the object, purpose and history of the constitutional amendment is considered.

[9] The object, purpose and history of the 1914 constitutional amendment have been considered by our courts on many occasions. City of Pasadena v. County of Los Angeles, 182 Cal. 171, 187 P. 418; City and County of San Francisco v. County of Alameda, 5 Cal.2d 243, 54 P.2d 462; City and County of San Francisco v. San Mateo County, 17 Cal.2d 814, 112 P.2d 595; Rock Creek Water Dist. v. County of Calaveras, 29 Cal.2d 7, 172 P.2d 863. In City and County of San Francisco v. San Mateo County, 17 Cal.2d 814, 818, 112 P.2d 595, 597, it was stated: "Prior to the amendment, the property of municipalities lying outside their corporate boundaries was exempt from taxation and that resulted in many instances in the county in which such property was situated losing large sources of revenue, a loss which it could ill afford. The aim of the amendment was to eliminate that condition." In Turlock Irr. Dist. v. White, 186 Cal. 183, at page 193, 198 P. 1060, at page 1064, 17 A.L.R. 72, the court stated: "The real purpose was to prevent abuses threatened and likely to recur from permitting private lands subject to taxation in one jurisdiction to be taken over for public uses by other communities, and, by depriving the territory in which the lands are situated of the revenue from this taxation, thus throw [sic] part of the burden of such public use upon territory not benefited by it."

Although, as a matter of policy, a strong argument might be made in favor of treating cities and counties who own property outside their boundaries in the same manner as private land owners for tax purposes, it is clear that the 1914 amendment did not make this equalization. The amendment specifically provides *"that no improvements of any character whatever* constructed by any county, city and county or municipal corporation shall be subject to taxation." (Italics added.) The intent of the amendment, which was obviously the result of a compromise between those counties seeking to acquire land outside their own boundaries and those counties in which such land was situated, was to allow the acquired land to remain on the tax rolls at the value it bore at the time of acquisition. Of course, in assessing the value of the property, the county in which it was situated might take into consideration, and benefit from, any *natural* rise in land values, but an increased value brought about by improvements made by the acquiring city or county could not be taxed by the assessing county.

[10] That this was the purpose of the amendment is made clear by reference to the argument presented to the voters on its submission. Not only is it established that the court may look to the argument presented to the voters in determining the intention of the framers of the measure, Carter v. Comm. of Qualifications etc., 14 Cal.2d 179, 185, 93 P.2d 140; Abrams v. City and County of San Francisco, 48 Cal.App.2d 1, 7, 119 P.2d 197; Ducey v. Dambacher, 27 Cal.App.2d 658, 662, 81 P.2d 597, but it is significant that the courts have frequently resorted to the argument presented to the voters in construing the very amendment here under consideration. Turlock Irr. Dist. v. White, 186 Cal. 183, 184, 198 P. 1060, 17 A.L.R. 72; City and County of San Francisco v. County of Alameda, 5 Cal.2d 243, 246, 54 P.2d 462; City and County of San Francisco v. San Mateo County, 17 Cal.2d 814, 818, 112 P.2d 595.

The argument states: "This amendment does not seek to hinder in any way the development of enterprises by and for the benefit of counties or municipalities, in any part of the state, but to protect from loss those counties into which they may enter for such purposes. * * *

"The proposed amendment does not penalize improvements that the invading corporation may make. On the contrary, it expressly limits taxation to the property as acquired and excludes any improvements thereafter made."

The argument then stated that, under the then existing law, "It would be possible for an acquiring city or county to virtually destroy the government of a small county by acquiring, for one purpose or another, for municipal use, the substance of its revenue yielding property. * * *

"It is to remedy such a condition that this amendment was proposed. Uncertainty on the matter should be removed by a legal assurance that while natural resources within one county may be directly used for the upbuilding of another, lands or other property already upon the invaded county's tax roll shall continue to bear its share of maintaining the local government."

From the background of the 1914 amendment, it is apparent that its purpose was to protect the tax rolls of invaded counties from the loss of taxable properties. City and County of San Francisco v. San Mateo County, 17 Cal.2d 814, 818, 112 P.2d 595. On the other hand, the invaded county was not to be allowed to assess the increased value of such properties when such increase came solely from expenditures made by the acquiring county. The *status quo* of the value of the property at the time of acquisition was to be maintained, save for an appreciation in value not arising from the expenditures made by the acquiring county or municipality. Thus, in City and County of San Francisco v. San Mateo County, supra, it was held that where San Francisco replaced a wooden flume which had been in existence at the time of the acquisition of land, with a concrete lined canal, and San Francisco claimed that the canal was not taxable, as it constituted a new improvement within the meaning of the constitutional section, San Mateo could properly assess the value of the canal, but "The assessed valuation upon which the tax levy was based was the same as that fixed when the Spring Valley Water Company owned the wooden flume." 17 Cal.2d at page 816, 112 P.2d at page 596. In other words, the property taxed was the old replaced wooden flume, not the new concrete lined canal constructed by the acquiring city.

[11] The legislative history of the amendment reveals that the clause which provides "that no improvements of any character whatever constructed by any county, city and county or municipal corporation shall be subject to taxation", properly interpreted is equivalent to "no increase in value, attributable solely to expenditures made by the acquiring county, city and county, or municipal corporation shall be subject to taxation." Under this construction, the dirt fill constituted an improvement within the meaning of Sec. 1, Art. XIII of the Constitution, and is therefore not subject to taxation by San Mateo County.

[12] The last contention of appellant is that, since part of the assessment is valid, and part is void, the entire assessment must be declared illegal. It should be mentioned that this contention is contrary to the theory of the complaint, and was not raised by appellant in its opening or reply briefs. The point was first mentioned at the oral argument, and later referred to indirectly in a supplemental brief filed after the oral argument. In any event, the point is without merit.

The principal case relied upon by appellant is San Pedro, L. A. & S. L. R. Co. v. Los Angeles, 180 Cal. 18, 179 P. 393. In that case a dirt fill, held not to be an "improvement" within the meaning of section 3617 of the Political Code, and a breakwater, held to be an "improvement," were assessed together. The court stated 180 Cal. at page 27, 179 P. at page 397: "It conclusively appears that the breakwater was not *separately* assessed, but included in the assessment with the fill with which unlawful assessment it is indivisible. Therefore, conceding the breakwater to be assessable, the assessment thereof, as shown by the record, is so blended with the assessment of the fill that it renders the entire assessment void. [Citing cases.] 'If the different parts, lawful and unlawful, are blended together in one indivisible assessment, it makes the entire assessment illegal.' State of California v. Central Pacific R. Co., 127 U.S. 1, 8 S.Ct. 1073, 32 L.Ed. 150." See, also, Teater v. Johnson, 95 Cal.App. 182, 272 P. 313, where the court held that an invalid assessment on two lots which were part of a quarter-section of land was so blended with the valid assessment as to render void the entire assessment; to the same effect see Santa Clara County v. Southern Pac. Railroad, 118 U.S. 394, 416, 6 S.Ct. 1132, 30 L.Ed. 118.

In all of the above cases the reason for holding the entire assessment void was that the valid and invalid portions of the assessment were inseparable. Here we are not confronted with that problem. Appellant has alleged that, due to the invalid portion of the assessment, its property has been appraised "to the extent of 588% more than the appraisement" which was proper, and the effect of respondent's demurrer was to admit the truth of this allegation. Therefore, by a simple mathematical computation the correct appraisal value can be determined, and there is no need for invalidating the entire assessment.

[13] A further ground for upholding the assessment on that part of the property which is not exempt is found in section 5141 of the Revenue and Taxation Code. This section was enacted in 1941, Stats. 1941, chap. 663, § 2, p. 2113, and was not in existence at the time the cases relied upon by appellant were decided. The section provides that: "If the court finds that the assessment complained of is void in whole or in part, it shall render judgment for the plaintiff for the amount of the taxes paid on so much of the assessment as is found to be void. * * * The taxes paid on so much of the assessment as is not found to be void shall constitute valid taxes * *." The section indicates the clear intention of the Legislature to be that when the void portion of an assessment can be separated from the valid portion, so much of the assessment as is valid should be upheld.

The judgment is reversed.

WARD and BRAY, JJ., concur.

95 Cal.App.2d 589

BOLLN v. PETROCCHI et al.

Civ. 3881.

District Court of Appeal, Fourth District. California.

Jan. 16, 1950.

Action for ejectment by Estelle Bolln against Leo Petrocchi and another.

The Superior Court of Orange County, Franklin G. West, J., rendered judgment for defendants, and plaintiff appealed.

The District Court of Appeal, Mussell, J., held that defendants were properly relieved from their default because of delay in making final payment on purchase price.

Judgment affirmed.

1. Contracts 🔑318

Statute respecting relief from forfeitures presupposes that party seeking relief is in default, and for him to secure relief under its terms, he must plead and prove facts that will justify its application. Civ. Code, § 3275.

2. Vendor and purchaser 🔑185

Where default by purchaser in payment of instalments to vendor has not been serious, and purchaser is willing and able to continue with performance of contract, and purchaser has made substantial part performance or substantial improvements in reliance on the contract, vendor will not be permitted to forfeit purchaser's rights under the contract notwithstanding time has been made of the essence. Civ. Code, § 3275.

3. Contracts 🔑318

Wherever a forfeiture is used merely to secure payment of a debt, or performance of some act, or enjoyment of some right or benefit, equity, considering payment, or performance, or enjoyment intended by agreement, forfeiture to be only an accessory, will relieve against such forfeiture and award compensation instead; the test being whether compensation can be adequately made for breach of the obligation which is thus secured. Civ.Code, § 3275.

4. Vendor and purchaser 🔑185

Where purchasers agreed to pay $1500 on filing of escrow instructions, and to pay in escrow $1500 on or before October 30, 1947, and the balance of $7,500 of purchase price amounting to $10,500, on December 8, 1947, delay of 22 days in paying the $7,500 in escrow did not entitle vendor to a forfeiture notwithstanding time was made the essence, where purchasers had made every effort to obtain the final payment and immediately upon its becoming available to them deposited it in the escrow and first notice of forfeiture was given purchasers after the balance had been deposited. Civ. Code, § 3275.

5. Vendor and purchaser 🔑98

An attempted rescission of contract by vendor because of delay of purchasers in making final payment was not effective where vendor did not offer as required by agreement to restore to purchasers any part of the instalments she had received. Civ. Code. § 1691, subd. 2.

◆

Macbeth & Smith, Los Angeles, for appellant.

Leroy P. Anderson and Donald Dungan, Costa Mesa, for respondents.

MUSSELL, Justice.

This is an action for ejectment. In October, 1947, plaintiff and defendants entered into a contract for the sale and purchase of a house and lot in the city of Newport Beach. Defendants agreed to pay to plaintiff the sum of $10,500 for the property, as follows: $1,500 on the signing of the escrow instructions, $1,500 to be paid into escrow on or before October 30th and the balance of $7,500 to be paid into escrow on December 8th, 1947. It was understood that defendants were to obtain the final payment of $7,500 from another escrow, to be closed on December 8th. The agreement provided that plaintiff was to have the right to the sum of $2,500 from the escrow on or before October 30th and defendants were to have possession of the property on November 20th, with the exception of a garage on the premises, which plaintiff would use and occupy until December 20th. The parties signed written escrow instructions embodying the terms of the agreement, except the provisions thereof relative to the occupancy of the garage. The general terms of the escrow included the following provisions:

"Time is of the essence of these instructions. If this escrow is not in condition to close by December 8, 1947, any party who then shall have fully complied with his instructions may, in writing, demand the return of his money and/or property; but if none have complied, no demand for return thereof shall be recognized until five days after the escrow holder shall have mailed copies of such demand to all other parties at their respective add*ress*es*s* shown in the escrow instructions. If no such demand is made, close this escrow as soon as possible."

Defendants paid $3,000 into the escrow, $2,500 of which was thereafter withdrawn therefrom by plaintiff on October 31, 1947. The evidence discloses the fact that the defendants were unable to obtain the final payment of $7,500 on December 8, 1947, from the other escrow as contemplated. However, they did obtain the money on December 30th and caused it to be deposited in the escrow to complete the payment of the purchase price.

On December 11th the plaintiff instructed the escrow company to withhold further action on the ground that the defendants had not fulfilled the terms of the contract, but the escrow company failed to notify the defendants of this instruction. On the same date, plaintiff requested permission from the defendants to use and retain the possession of the garage located on the real property until January 1, 1948. This request was granted and the possession of the garage was delivered to the defendants on January 1st. On December 22nd, the plaintiff made a demand on the escrow company for the return of the deed, tax receipts and fire insurance policy upon the ground that the escrow was not in a condition to be closed by December 8th and that plaintiff was, therefore, entitled to the return of her papers under the instructions. The escrow company, however, did not return the papers to plaintiff nor did it notify the defendants of the demand. On December 30th, plaintiff filed and served the complaint in this action, which was the first notice and first demand which defendants had received from anyone regarding the payment of the balance of the purchase price.

The trial court rendered judgment in favor of the plaintiff for interest at the rate of 7% per annum for the period between December 8th and December 30th, 1947, and decreed that the defendants were in lawful possession of the real property described in the complaint under a valid contract of sale and were the equitable owners of the property. The court concluded that the delay of the defendants from December 8th to December 30th, 1947, in paying into escrow the $7500.00 balance of the purchase price did not terminate or forfeit the rights of the defendants in the contract of sale and that the plaintiff waived the default, if any, by the defendants, by her conduct in requesting the use and occupancy of the garage until January 1, 1948, and by her conduct in retaining the possession thereof until that time. It was found that the delay by the defendants of 22 days in paying the $7,500 due on the purchase price was not due to the gross negligence, wilfulness or fraudulent breach of duty on the part of the defendants. Plaintiff appeals from the judgment principally on the ground that the court erred in relieving the defendants from their default in failing to make the final payment within the time prescribed by the agreement.

[1] The defendants contend that the trial court properly relieved them from default under the provisions of section 3275 of the Civil Code, which provides:

"Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

This section presupposes that the party seeking relief is in default and in order to secure relief under its terms, it is necessary for him to plead and prove facts that will justify its application. (Barkis v.

Scott, 34 Cal.2d 116, 208 P.2d 367. It is our conclusion that the defendants have brought themselves within the terms of this statute, both by pleading and proof.

[2, 3] While it is true that there are many cases holding that a vendee who is in default cannot maintain an action to recover sums previously paid on a contract for the sale of real property, Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17; Rocks v. Hamberger, 89 Cal.App.2d 194, 200 P.2d 92; Keelan v. Bellmont Co., 73 Cal.App.2d 6, 10, 165 P.2d 930 a vendee in default who is seeking to keep the contract alive, however, is in a better position to secure relief than one who is seeking to recover back the excess of what he had paid over the amount necessary to give the vendor the benefit of his bargain after performance under the contract has terminated. As was said in the Barkis v. Scott case, supra, 34 Cal.2d at page 122, 208 P.2d at page 371:

"When the default has not been serious and the vendee is willing and able to continue with his performance of the contract, the vendor suffers no damage by allowing the vendee to do so. In this situation, if there has been substantial part performance or if the vendee has made substantial improvements in reliance on his contract, permitting the vendor to terminate the vendee's rights under the contract and keep the installments that have been paid can result only in the harshest sort of forfeitures. Accordingly, relief will be granted whether or not time has been made of the essence."

In Gonzales v. Hirose, 33 Cal.2d 213, 216, 200 P.2d 793, 795, the court said:

"The test as to when a party will be relieved from a forfeiture is stated by Pomeroy, Equity Jurisprudence (5th ed.), section 433, as follows: 'Wherever a penalty or a forefeiture is used merely to secure the payment of a debt, or the performance of some act, or the enjoyment of some right or benefit, equity, considering the payment, or performance, or enjoyment to be the real thing intended by the agreement, and the penalty or forfeiture to be only an accessory, will relieve against such penalty or forfeiture by awarding compensation instead. * * * The test which determines whether equity will or will not interfere in such cases is the fact whether compensation can or cannot be adequately made for a breach of the obligation which is thus secured'."

[4, 5] In the instant case, defendants made every effort to obtain the final payment on the contract and immediately upon its becoming available to them, deposited it in the escrow to complete the transaction. The first notice of the claimed forfeiture given them by the plaintiff was the copy of the summons and complaint herein. Unquestionably, there was a substantial part performance of the agreement by the defendants. In fact, there was a full performance as soon as possible under the circumstances here shown. In this connection, it should be noted that if the letter of December 22, 1947, written by plaintiff's attorneys to the escrow company in which demand was made for the return of plaintiff's papers was an attempt to rescind the contract, such attempt was not effective for the reason that appellant did not then or at any time restore or offer to restore to the defendants any part of the $2,500 which she had received out of the escrow. Civ.Code Sec. 1691, subd. 2. We are impelled to the conclusion from the facts established by the record that the defendants were entitled to relief which the court afforded them under the provisions of Section 3275 of the Civil Code.

Complaint is made by the plaintiff she was not allowed full exploration of the injury to her caused by respondents' tardiness in making their last payment under the contract. We have examined the record in this respect and are unable to find any errors in the court's ruling as to the admissibility of offered testimony.

Judgment affirmed.

GRIFFIN, Acting P. J., concurs.

95 Cal.App.2d 700

GOLDBERG et al. v. UNDERHILL.

Civ. 17205.

District Court of Appeal, Second District, Division 1, California.

Jan. 25, 1950.

Louis Goldberg, M. D., and another sued H. W. Underhill for damages in connection with erection of an office building under supervision of defendant.

The Superior Court of Los Angeles County, Charles B. MacCoy, J., rendered judgment for plaintiffs and defendant appealed.

The District Court of Appeal, Doran, J., held that evidence supported trial court's findings for plaintiffs.

Judgment affirmed.

1. Appeal and error 🔑1010(1)

Where record discloses substantial evidence in support of findings of trial court, Appellate Court will not weigh evidence or consider whether trial court should not, perhaps, have arrived at a different conclusion.

2. Contracts 🔑350(1)
Fraud 🔑58(1)

Evidence supported recovery of damages by owners against architect who was also contractor, resulting from defective plans negligently prepared by defendant, defective construction supervised by defendant and alleged fraud and misrepresentation in respect to cost of proposed building.

3. Evidence 🔑434(10)

In owners' action against licensed architect who was also the contractor for alleged fraud, admitting parol evidence to establish fraud was not error notwithstanding parties had entered into written building contract.

4. Damages 🔑140
Fraud 🔑62

Award to owners against architect who was also contractor of $1,000 for defective plans negligently prepared by defendant, of $3,000 for defective construction supervised by defendant and of $1,000 for fraud in respect to cost of proposed building was warranted under the evidence.

William Ellis Lady, Gordon Stater, Los Angeles, for appellant.

Donald A. Rosen, Los Angeles, for respondents.

DORAN, Justice.

The plaintiffs-respondents, a physician and dentist respectively, contracted with the defendant-appellant H. W. Underhill, a licensed architect and contractor, for the construction of an office building. The complaint herein contained three causes of action, and claimed damages resulting from (1) defective plans negligently prepared by defendant; (2) defective construction supervised by the defendant; (3) fraud and misrepresentation in respect to the cost of the proposed building, etc. The trial court found in favor of plaintiff as follows: $1,000.00 damages in respect to the first cause of action; $3,000.00 damages on the second cause of action; $1,000.00 damages on the third cause of action. The defendant has appealed from this judgment.

The appellant's brief avers that "the plaintiffs did not sustain their burden of proof in any of these respects", and that "Practically all of the plaintiffs' evidence was directly controverted by one or more witnesses on behalf of the defendant". Appellant maintains that "Where an architect draws plans under a written contract, he is not liable for damages allegedly caused by either (a) a decision by the owners arrived at during construction, that they do not like the location of a lavatory or toilet, or (b) a change from the plans necessitated because a certain kind and size of air conditioning unit could not be obtained". It is likewise claimed that a contractor is not liable for damages caused by deviations from the plans ordered by the owners; that an unambiguous written contract cannot be altered "by verbal conversations or alleged verbal agreements occurring prior to its execution". On the issue of fraud, it is claimed that the trial court erred in not permitting the defendant to prove that plaintiffs had actually received in value much more than the amount paid out, and therefore suffered no loss.

[1, 2] The argument that the trial court "seemingly gave more credence to the testimony of the medical profession than to the testimony of these men of the construction trade itself", and that there were "13 expert men who directly and unequivocably refuted the claims of the plaintiffs as to poor workmanship or poor materials", goes, of course, to the weight and credibility of the evidence. It is fundamental that, where the record discloses substantial evidence in support of the findings, an appellate court will not weigh the evidence or consider whether the trial judge should not, perhaps, have arrived at a different conclusion. That the evidence herein was in conflict as to various points goes without saying; nor can it be denied that the record affords substantial evidence in support of the trial court's findings.

There is evidence, as found by the trial court, to the effect that the defendant architect-contractor, represented that the building would cost less than $12,000.00 whereas its cost was in excess of $22,000.00; that the building was not completed within the time as represented; that neither the plans prepared nor the construction thereunder was such as the plaintiffs had a right to expect; that the building was erected in an "unskillful" and "unworkmanlike manner". The many shortcomings include inadequate space for receptionist; inadequate heating and air conditioning system; location of toilet; unsuitable and inadequate doorlocks, electric wiring, soundproofing, plumbing, lighting, etc.

The appellant's argument that there should be no liability because the plans were changed by the owners during construction does not squarely meet the issues here presented, and is without merit in view of the evidence disclosed by the record. In this connection it cannot be forgotten that the defendant here occupied the dual position of architect and contractor.

[3] The same may be said in respect to the appellant's other points, none of which present reversible error. This is particularly true in reference to the trial court's alleged error in permitting the introduction of parol evidence. That such evidence is admissible for the purpose of proving fraud is well established.

[4] In respect to damages, there is likewise evidence which will sustain the trial court's award. Appellant's argument that since there was a difference of $10,000.00 between the represented cost of the building and the actual cost, a judgment for less than that amount cannot be sustained, "comes", as respondents' brief suggests, "with poor grace, because the defendant is the one to benefit, and not plaintiffs".

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

95 Cal.App.2d 671

STATE COMPENSATION INS. FUND et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

No. 14254.

District Court of Appeal, First District, Division 1, California.

Jan. 20, 1950.

Hearing Denied March 20, 1950.

Petition by State Compensation Insurance Fund and Pickering Lumber Company for a writ of review for the purpose of having the District Court of Appeal determine the legality of the findings and award of the Industrial Accident Commission in favor of two minors, Joyce Cecilee Hudson and Carol Marie Hudson in the sum of $7,500 under the Workmen's Compensation Act, and payable to their mother, Marie Hudson Bellah, as guardian ad litem and trustee.

The Court of Appeal, Ward, J., held that the award of $7,500 was proper since at time of workman's death there was a surviving widow and two dependent minor children notwithstanding that surviving widow was not dependent on employee and was not living with him and shortly thereafter married another.

Writ discharged and award affirmed.

Bray, J., dissented.

1. Workmen's compensation ⚿436, 912

Under the Labor Code providing for death benefit of $7,500 in the case of a surviving widow with one or more dependent minor children, there was a "surviving widow" although husband and wife were living apart and wife was not dependent on husband and shortly after employee's death married another, and where there were two minors who were dependent upon deceased workman, award of $7,500 was proper. Labor Code, § 4702(b).

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Surviving Widow".

2. Statutes ⚿190

The court may interpret statute only where there is an ambiguity.

3. Workmen's compensation ⚿912

The Labor Code, providing for death benefit of $7,500 in the case of a surviving widow with one or more dependent minor children, is not ambiguous, and is in no need of construction. Labor Code, § 4702(b).

◆

Donald Gallagher, Royle A. Carter, San Francisco, for petitioners.

T. Groezinger, Robert Ball, San Francisco, for respondent Industrial Accident Commission.

WARD, Justice.

This petition for a writ of review was filed by the State Compensation Insurance Fund and Pickering Lumber Company, a corporation, for the purpose of having this court examine and determine the legality of the findings and award of the Industrial Accident Commission in favor of two minors, Joyce Cecilee Hudson and Carol Marie Hudson, in the sum of $7,500 (maximum death benefit under the Workmen's Compensation Act) and payable to their mother, Marie Hudson Bellah, as guardian ad litem and trustee.

On November 17, 1948, John C. Hudson sustained a fatal injury arising out of and occurring in the course of his employment as a timber faller with the Pickering Lumber Company, which resulted in his death the following day. The insurance carrier for the lumber company was the State Compensation Insurance Fund, and both the employer and employee were subject to the provisions of the workmen's compensation laws of the state. The deceased was the sole support of his two minor daughters who lived with him and they were his only dependents, though he lived with a woman not his wife, who was the mother of three children. He and his wife had been living apart for four years and by mutual oral agreement he was not contributing anything to her support. She married her present husband, Mr. Bellah, a month after the death of Hudson.

On May 5, 1949, the commission issued its findings and made a death award in the amount of $7,500, payable at the rate of $30 a week to the mother of the two minors, as guardian ad litem and trustee, for the support of the minors and not the "surviving widow." The award was based upon maximum wages within the meaning of the Workmen's Compensation Act, as provided in section 4702 of the Labor Code, Labor Code, 1947 Supp., p. 60. The pertinent part of the section reads as follows: "* * * the death benefit * * * shall not exceed * * * the sum of six thousand dollars ($6,000), except in the case of a surviving widow with one or more dependent minor children, in which case the death benefit shall not exceed seven thousand five hundred dollars ($7,500) * * *." Subd. (b). Under the section the amount of the death benefit for total dependency is computed as allowable up to a total of four times the average annual earnings of the deceased employee, which in the present case would be an amount in excess of $6,000; but the section provides that the award may be increased to a maximum of $7,500 only under the specified exception of "the case of a surviving widow with one or more dependent minor children * * *."

The real question presented on this petition is the amount of the award. It is contended that the award should have been $6,000 instead of $7,500, and that by reason of the award of the additional sum of $1,500 the insurance carrier and the employer to that extent were deprived of property without due process of law. Cal. Const., art. I, § 13; U.S.Const., art. XIV. Petitioners argue that the legislative intent was to pay death benefits only for dependents of the deceased, and cite cases holding that the intention of the Legislature is to be followed if possible, Dickey v. Raisin Proration Zone No. 1, 24 Cal.2d 796, 151 P.2d 505, 157 A.L.R. 324, and that the Legislature is without power to require payment for the benefit of those who are not either injured employees or their dependents. Commercial Casualty Ins. Co. v. Industrial Acc. Comm., 211 Cal. 210, 295 P. 11. The legislative intent, however, *is* carried out in this case, as the award was made for the benefit of the dependent minor children though made payable to the surviving widow, who was appointed by the commission as their guardian ad litem and trustee.

Under the Workmen's Compensation Act awards are made only for the benefit of surviving dependents. Where there are no dependents no benefit should be awarded. The award here is made for the dependent children and there is no award for the "surviving widow." In the present case the wife is not a dependent. She could not be classified as such in view of an oral agreement that she should live separate from her husband, with no reservation as to support. Civ.Code, § 175.

[1-3] At the time of Hudson's death the wife was the surviving widow. That is all that the statute refers to, namely, "a surviving widow." Prior to Hudson's death the minors were in fact solely dependent upon the father. Upon his death the minors became dependent upon the "surviving widow," who had previously worked to support herself. The liability which fell upon the surviving widow not only to support the two children but to devote to them the care of a mother and guardian not only reduces the ability of the "surviving widow" to support herself but accordingly reduces her ability to supplement the $6,000 and thereby lengthens the readjustment period. Hence the commission deemed that a necessity had arisen to award the *children,* not the mother, the additional amount that may be awared under section 4702. It appears that the language used in section 4702 was selected advisedly. The term "surviving widow" includes a nondependent widow, likewise a dependent widow. If the statute provided only for a dependent widow the commission could not have granted the increased amount to the children. It is not necessary to decide in this case that the mother of the children, whether married or not, is, in the eyes of the law, the surviving widow of the marriage union resulting in the birth of the two children now dependent upon her. The facts of this case show that on the date of the father's death the mother of the children was in fact and in law the surviving widow of the deceased father. The fact that the mother subsequently married her present husband is of no consequence in determining her status on the date of the death of her husband. A court

may interpret only where there is an ambiguity. Where the language is clear, certain and unambiguous there is no room for interpretation. That is the case here. When the Legislature wanted to limit awards to dependents it knew how to do so. When it omitted the term "dependent" in section 4702 it must be held that the omission was intentional. Any other rule would mean that this court, even where the Legislature has indicated that when it wanted to limit the power of the commission it knew how to do so, and did so in other parts of this very chapter and section, could determine that because the Legislature should have limited the section here involved it in fact did so. It is sufficient if a court finds a provision in a statute and passes upon the construction of the phrases or words used by the Legislature and not upon a provision that a court may feel should have been inserted. There is no intent herein to hold that a readjustment period is longer for children with a mother than for motherless children. The motherless children problem will be passed upon when presented in a case raising that question upon the facts. The language used in section 4702 fits perfectly the facts of this case.

The writ is discharged and the award of the Industrial Accident Commission is affirmed.

PETERS, P. J., concurs.

BRAY, Justice.

I dissent. I cannot agree to an interpretation of the Workmen's Compensation Act and of section 4702 of the Labor Code, which permits death benefits up to $6000 only, where there are dependent minor children who are motherless or whose mother has remarried (and therefore is not a "surviving widow") at the time of their father's death, and up to $7500, where there are dependent minor children who have a mother who is in nowise dependent upon their father. Taking the phrase "surviving widow with one or more dependent minor children" away from its context in section 4702 and from the Workmen's Compensation Act, the majority finds that there is no ambiguity and hence no room for judicial interpretation. However, taking the section as a whole, it clearly appears that the awards can be made for *dependency* only. In subdivision (a) of the section it states that the death benefit shall in a case of total *dependency* be determined as therein set forth, while in subdivision (b) the method is provided for determining it a case of partial *dependency*. Section 4703, which determines the right to a death benefit, uses the terms wholly *dependent* and partially *dependent*. Section 4701(b) states that a death benefit shall be allowed to the "*dependents* when the employee leaves any person *dependent* upon him for support." (Emphasis added.) Article XX, section 21, of the California Constitution, which provides for enactment by the Legislature of a complete system of workmen's compensation, states that it is to compensate the workmen and their *dependents*. Thus, taking the phrase under consideration here in context with the balance of the section and in conjunction with the rest of the act and the Constitution, it is obvious that the phrase is ambiguous and requires interpretation.

The majority opinion concedes that the surviving widow here is not dependent, and hence no award could be made to her; yet it intimates that because support of the children may reduce her ability to support herself, the Legislature intended that the award to the children should be increased. But how about children who are motherless at the time of their father's death? More should be awarded them than to children who have a mother to contribute to their care. It is unrealistic to hold that the Legislature intended to award a larger death benefit to children with a mother, than to motherless children. The "readjustment period," say the majority, in effect, is longer for children with a mother than for motherless children. Patently this is not so. A common sense construction of the act should be adopted by the courts rather than to read into the act a legislative intent that results in the anomalous result here. Such a construction results, in fact, although not in words, in making the widow here a dependent, which she admittedly is not. It is obvious that the Legislature intended to allow a death benefit up to $6000 for dependent children alone, whether they were motherless or had a nondependent mother. If they had a dependent mother, the award could be up to $7500, to be divided between the mother and children as the commission might see fit.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

95 Cal.App.2d 696

LYNN v. CABLE.

Civ. 4104.

District Court of Appeal, Fourth District, California.

Jan. 24, 1950.

Action by Lawrence G. Lynn against Dewey M. Cable to recover damages for breach of lease agreement.

The Superior Court of San Bernardino County, A. D. Mitchell, J., entered judgment for defendant and plaintiff appealed.

The District Court of Appeals, Mussell, J., held that final judgment in previous action between the parties in justice court, allowing tenant damages for breach of lease as an off-set against claim for rent, was res judicata barring recovery in subsequent action for breach of lease.

Judgment affirmed.

1. Appeal and error ⇨1011(1)

Trial court's findings based on conflicting evidence and having substantial support in the evidence are conclusive on appeal.

2. Landlord and tenant ⇨288

Action for unlawful detainer is primarily an action for recovery of property and the recovery of rent is a mere incident to the main object.

3. Judgment ⇨540

Final judgment on the merits, identity of issues and identity or privity of parties are essential to a plea of res judicata.

4. Judgment ⇨590(2)

Where landlord amended complaint in unlawful detainer action in justice court and proceeded to trial without objection by tenant on a complaint for rent, final judgment allowing tenant damages for breach of lease as an off-set against claim for rent was res judicata barring recovery in subsequent action by tenant against landlord for breach of lease.

5. Pleading ⇨427

Parties may voluntarily submit and try an issue without any specific pleadings and thus be estopped from complaining thereof after judgment.

Henry F. Rager, Fontana, for appellant.

Nichols, Cooper & Hickson and Raymond G. Lamb, A. L. Hickson, Pamona, for respondent.

MUSSELL, Justice.

This is an action for damages for breach of a lease agreement. On the 14th day of June, 1946, plaintiff and defendant herein entered into an agreement, in writing, under and pursuant to the terms of which the defendant leased to plaintiff a building at the Claremont Airport in the County of San Bernardino at a monthly rental of ten per cent of the gross income of defendant, with a minimum rental payment of $75.00 per month. The lease provided that the lessor make certain improvements to the building as soon as materials therefor were available and that the lessee should have the exclusive right to conduct the business of the repairing, inspecting and servicing of aircraft engines on the premises. A controversy arose between the parties with respect to the payment of the rents and also as to the performance of the terms of the lease by the lessor and on the 28th day of May, 1947, the defendant, Dewey M. Cable, filed an action for unlawful detainer in the Justice's Court of San Bernardino Township, in the County of San Bernardino. This action was No. 13197 of the records of that court. The complaint contained allegations that the plaintiff was the owner of the property; that the lease was executed by the parties; that the defendants failed to pay the monthly rental from and after the 20th day of December, 1946, to the 20th day of May, 1947, and were indebted to the plaintiff for rental for said period in the total sum of $375.00; that the plaintiff made a demand for the payment of the rental or the delivery of the property and that the plaintiff elected to declare the lease forfeited. Damages were asked for in the sum of $2.50 per day from and after May 20, 1947, until possession of the property was given to the plaintiff. An answer was filed admitting the execution of the lease and denying all the remaining allegations of the complaint. The action was tried and a memorandum of decision was signed by the court, as follows:

"This Cause tried on September 11, 1947, at 2 P.M. Plaintiff asked leave to amend complaint on account of rent and abandon unlawful detainer. Motion granted on stipulation of defendant on condition that defendant be permitted to introduce evidence in opposition thereto. Plaintiff showed rent for five months at $75.00 per month due and unpaid. Defendant offered evidence that plaintiff had not completed the building and showed material had been available therefor, and that plaintiff had failed and neglected to install a separate electric power meter and meter switch, and refused defendant right to use the electric current.

"Damages allowed to defendant $168.75 as offset against plaintiff's claim for $375.00. Judgment for plaintiff for $206.25." No appeal was taken from this judgment and it became final.

On September 11, 1947, plaintiff, Lawrence G. Lynn, filed the present action in the Superior Court for a breach of the lease agreement, alleging generally that the defendant, Dewey M. Cable, had breached the agreement by failing and refusing to comply with the conditions thereof with respect to the completion of the building; by failing to grant the exclusive rights to the repairing business to plaintiff; by failing to install a separate electric power meter and switch, and by cutting off the electricity supplied to the premises. Damages were prayed for in the sum of $30,000.

[1] At the time of the trial of the instant action, the defendant objected to the introduction of evidence as to breach of the lease and damages on the ground that the Justice Court action was res judicata as to the issues presented and that the plaintiff was estopped from setting up further damages as against the defendant. It was agreed between the parties that this issue should be litigated prior to a further hearing on the question of damages and breach of the lease. Testimony was then adduced concerning the proceedings had in the Justice Court and on conflicting evidence, the court found that the lease was executed as alleged in both cases; that at the trial of the action in the Justice Court, the plaintiff therein, Dewey M. Cable, amended his complaint in open court by permission of the judge and proceeded to trial without objection by the defendant on a complaint for rent for the premises for a period of five months at a total rental of $375.00 and that the defendants offered evidence that the plaintiff in the action had not completed the building, being the subject of the lease, as agreed; that the court granted and allowed to the defendants the sum of $168.75 as damages against the plaintiff and gave judgment for the plaintiff for the sum of $206.25. The trial court further found that the judgment in the Justice Court action was res judicata and a bar to recovery under the present action. The findings of the court find substantial support in the evidence and cannot be here questioned. Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689.

[2] The action in the Justice Court was one for unlawful detainer which is primarily an action for the recovery of property, and the recovery of rent is a mere incident to the main object. Markham v. Fralick, 2 Cal.2d 221, 227, 39 P.2d 804. However, in the present action, it is apparent from the judgment rendered in the Justice Court that the parties had tried the case as an action for rent and upon stipulation, the defendant was accorded the privilege of offering evidence to offset the rent. The sum of $168.75 deducted from the rent due was apparently allowed as damages to the defendant for the failure

of the plaintiff to abide by the terms and conditions of the lease. As set forth in the memorandum of decision, there was evidence offered that the plaintiff had failed to complete the building and had failed and neglected to install a power meter and refused the defendant the right to use the electric current.

[3] In Bernhard v. Bank of America Nat. Trust & Savings Ass'n., 19 Cal.2d 807, 813, 122 P.2d 892, 895, the questions pertinent to the determination of the validity of a plea of res judicata are set forth as follows:

"Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?"

In Krier v. Krier, 28 Cal.2d 841, 843, 172 P.2d 681, it was held that a judgment in a prior question between the same parties on the identical cause of action is res judicata and a bar to a second suit thereon, not only as to issues actually determined therein but also as to issues necessarily involved.

[4, 5] We conclude that the plea of res judicata was valid in view of the circumstances set forth in the record. Furthermore, as was said in McAllister v. Union Indemnity Co., 2 Cal.2d 457, 460, 42 P.2d 305, 306:

"It is also true that the parties may voluntarily submit and try an issue without any specific pleadings and thus be estopped from complaining thereat after judgment. Poledori v. Newman, 116 Cal. 375, 377, 48 P. 325; Mock v. [City of] Santa Rosa, supra [126 Cal. 330, 58 P. 826]; Sidler v. [City Council of City of] Bakersfield, 43 Cal.App. 349, 185 P. 194; McDougald v. Hulet, 132 Cal. 154, 163, 64 P. 278; Baar v. Smith, 201 Cal. 87, 98, 99, 255 P. 827, 832."

In the instant case the judgment in the Justice Court is admittedly final, no appeal having been taken therefrom and the defendant therein (plaintiff in the instant case) is bound by the judgment and was estopped to retry the issues involving damages for the alleged breach of the lease by the landlord.

Judgment affirmed.

GRIFFIN, Acting P. J., concurs.

95 Cal.App.2d 680

WARD et al. v. DOWNEY et al.

Civ. 3971, 3977.

District Court of Appeal, Fourth District, California.

Jan. 23, 1950.

Hearing Denied March 23, 1950.

Action by Dorothy F. Ward and Grace E. Frame against Angela C. Downey and John F. Downey, Jr., for specific performance of an escrow agreement and contract for purchase of realty. The First National Bank of Vista, a national banking association, was interpleaded.

Defendants appealed from an interlocutory decree entered for plaintiffs, and on final hearing, the Superior Court of San Diego County, Dean Sherry, J., entered final judgment awarding plaintiffs damages, and both plaintiffs and defendants appealed.

The District Court of Appeal, Mussell, J., after consolidation of two appeals, held that plaintiffs were not entitled to a decree of specific performance, and that defendants were justified in terminating escrow agreement in accordance with express provision of escrow instructions.

Judgments reversed.

1. Specific performance 🔑94

In action by vendors for specific performance of contract to purchase realty, vendors must fulfill all conditions precedent imposed upon them, and must have been able to fulfill and must have offered to fulfill all such conditions.

2. Specific performance 🔑94

Neither party to a written contract to sell realty can maintain an action for its performance without having performed conditions to be performed by him.

3. Vendor and purchaser ⚷130(2)

In vendor's action for specific performance of a contract to purchase realty, failure of vendors to submit documents to title company enabling it to determine possibility of estate tax resulted in a defect of title which made it "unmarketable" within meaning of terms of offer to purchase, and where purchasers properly served on escrow holder a written notice stating that they were terminating escrow and demanding return of money deposited by them, escrow agreement and contract for sale of realty were unenforceable.

4. Vendor and purchaser ⚷130(2)

Where there is any reasonable doubt relative to litigation regarding title to realty, realty is not "marketable", and an action cannot be maintained by vendor for specific performance of contract for its sale.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Marketable".

Paul E. Iverson, Los Angeles, and John H. Dawson, San Diego, for appellants.

Price, Nottbusch, Cory & Schwartz, San Diego, for respondents.

Wright, Thomas, Dorman & Fox, San Diego, for interpleader.

MUSSELL, Justice.

This is an action for specific performance of an escrow agreement and contract for the purchase of real property. Plaintiffs, Dorothy F. Ward and Grace E. Frame, as sellers, and defendants, Angela C. Downey and John F. Downey, Jr., as buyers, on July 10, 1947, executed two written agreements; one designated "Offer to Purchase Real Estate" and the other "Escrow Instructions", relating to ranch property near Vista. The agreements provided that the escrow through which the transaction was to be consummated was to close on October 10, 1947, and that time was of the essence. The total purchase price was $63,000. Defendants paid the plaintiffs $2,500 cash outside of escrow, deposited $3,500 into an escrow at the First National Bank of Vista, and delivered checks totaling $37,000 to one of the officers of J. H. Fotheringham, Inc., the real estate agent, for deposit into the escrow when it was ready to close. The defendants obtained a commitment from the Bank of America for the balance of the purchase price ($20,000), to be secured by a first trust deed on the property involved.

On October 10, 1947, the title to the property was in the names of plaintiffs and Robert E. Frame, as joint tenants. Robert E. Frame died in August, 1946, in Illinois, and proceedings to determine his death and to terminate the joint tenancy were commenced by the plaintiffs on the 10th day of September, 1947, resulting in a decree determining the death of the joint tenant, signed by the court on the 17th day of October, 1947. These proceedings were commenced on advice of the Union Title Insurance and Trust Company to determine, among other things, the amount of inheritance tax and federal estate tax due and to supply the company with a receipt for the payment of any tax so found due.

On October 8, 1947, the title company, by letter, informed the First National Bank of Vista, the escrow agent, that a title policy could not be issued until a clearance of a possible lien for federal estate tax was received. The title company requested a verified statement of the value of the property outside of the State of California owned by Robert E. Frame at the time of his death. On October 17, 1947, plaintiffs secured and supplied to the title company an affidavit of Saul A. Epton containing the statement required as to property owned by Robert E. Frame. On October 8, 1947, an officer of the First National Bank of Vista informed the Bank of America that because the plaintiffs had failed to supply the necessary documents to clear the title to the property from a possible lien for federal estate taxes, the escrow could not close on October 10, 1947, and that the title could not be cleared until the 17th or 24th of that month.

On October 11, 1947, the defendants served on the escrow holder a written notice, stating that they were terminating the escrow and demanded the return of the money deposited by them for the reason that the sellers had been unable to comply with the terms of the escrow instructions, and that they, the defendants, did not desire to grant them any additional time for that purpose.

The plaintiffs then, on October 15, 1947, instituted this action for specific performance. On the 19th day of January, 1949, an interlocutory decree was entered for specific performance of the offer to purchase and the escrow instructions, awarding the plaintiffs damages for monies expended by them for the care and maintenance of the property and interest on the balance of the purchase price. From this decree the defendants appealed. On the 30th day of June, 1949, plaintiffs obtained a final judgment in the action awarding them the sum of $10,081.16 damages by reason of the failure of the defendants to specifically perform the contract as provided in the interlocutory decree. Both the plaintiffs and defendants appealed from this final judgment.

The plaintiffs complain that the court should have provided by its decree that the sellers had a lien as vendors upon the property as security for the unpaid balance of the purchase price, plus amounts allowed for care and maintenance of the property, interest and court costs. The defendants contend that the trial court erred in finding that the plaintiffs had fully performed every act incumbent upon them to be performed before October 10, 1947, when the evidence was that the plaintiffs had failed to supply the documents necessary to pass a marketable title or to enable the title company to write its title policy until October 17, 1947; that the court erred in granting a judgment for specific performance when the plaintiffs did not fully comply with their contract on the due date and in failing to find that the defendants had terminated the escrow on October 11, 1947, when written notice of termination was given in accordance with the terms of the escrow instructions. There are numerous other specifications of error which we conclude are not material to the inquiry here, in view of our conclusion that the plaintiffs, under the circumstances here shown, were not entitled to a decree of specific performance. By stipulation of the parties, the two appeals have been consolidated.

The pertinent provisions of the offer to purchase real estate here involved and signed by the purchasers and the sellers are as follows:

"Title to said premises is to be shown marketable and free of all encumbrances (except as above mentioned and restrictions and rights of way of record) by the evidence of a standard form of Policy of Title Insurance issued by Union Title Insurance and Trust Company, with liability in amount of sale price, to be procured by seller at his expense, which policy shall be delivered to purchaser upon recordation of grant deed conveying said property to the undersigned."

The escrow instructions signed by the parties provided in part as follows:

"I will also execute and deliver to you before the time limit hereinafter named any instruments, including notes secured by encumbrances I create, and additional funds required from me to enable you to comply with these instructions, all of which you are authorized and instructed to use provided on or before October 10, 1947, instruments have been filed for record entitling you to procure assurance of title in the form of a policy of title insurance issued by Union Title Insurance and Trust Company subject to all the exceptions, terms and conditions contained therein, with liability of issuing title company limited to not less than $63,000.00 * * *"

The escrow instructions further provided as follows:

"In the event that the conditions of this escrow have not been complied with at the time provided herein, you are instructed, nevertheless, to complete the same at any time thereafter as soon as the conditions (except as to time) have been complied with, unless I shall have made written demand upon you for the return of money and/or instruments deposited by me."

It is apparent from the record before us that the plaintiffs failed to supply the instruments necessary to enable the title company to issue its title policy until October 17, 1947, seven days after the date fixed for the closing of the escrow. The letter written by the title company on October 8th clearly indicated that it required a clearance of the federal estate tax before closing the escrow, and in a later letter, dated October 15, 1947, the title company notified the escrow holder in part as follows:

"The matter of possible inheritance tax and possibility of federal estate tax that may be due by reason of the death of Robert E. Frame, has been taken up with our legal department and in their opinion it will be necessary to bring an action in this state, terminating the joint tenancy between the Frames and Wards and determining the amount of inheritance tax and federal tax, if any, that will be due.

"It will also be necessary, if such tax is found to be due, to have the proper receipt exhibited for such tax."

The action brought to terminate the joint tenancy and to determine the taxability of the property was not reduced to judgment until October 17, 1947, and on October 22, 1947, in a letter to the escrow holder, the title company stated in part as follows:

"Referring to your letter of October 21st regarding the 'Downey-Frame & Ward' Escrow in which you inquire whether we could have passed title on this property on October 10, on that date we had a clearance of all matters involving this title with the exception that we required a statement of value of any and all property owned by Mr. Frame outside of the State of California, and as we more fully set forth in our letter of October 8th."

There was testimony by the vice-president of the title company that it was the custom of the company on October 10, 1947, that the seller be required to place all of the documents in escrow before the buyer was asked to deposit the purchase price. In the instant case, the plaintiffs executed a grant deed, which they delivered to the escrow holder and it was by them delivered to the title company on August 13, 1947, but it was not then or thereafter recorded. It was not until October 22, 1947, that the title company advised the escrow holder that they had the necessary clearance enabling them to close the matter with the exception of the action filed herein on October 15, 1947, for specific performance.

[1, 2] Before the plaintiffs, as sellers, could compel the defendants to perform their part of the agreement, the plaintiffs must have fulfilled all conditions precedent imposed upon them and must have been able to fulfill and must have offered to fulfill all such conditions. Lifton v. Harshman, 80 Cal.App.2d 422, 433, 182 P.2d 222; Mayer v. Beondo, 83 Cal.App.2d 665, 667, 189 P.2d 327, 190 P.2d 23; In Del Porto v. O'Donnell, 84 Cal.App.2d 548, 550, 190 P.2d 955; it was held that neither party to a written contract to sell real property could maintain an action for its performance without having performed the conditions to be performed by him. (Citing cases.)

[3, 4] The requirement of the offer to purchase that the title to the premises was to be shown "marketable and free of all encumbrances" was not met by the plaintiffs as of the date set for the closing of the escrow. It seems quite clear to us that, in view of the failure of plaintiffs to submit documents to the title company enabling it to determine the possibility of an estate tax, a defect in the title resulted which made it unmarketable within the meaning of the terms of the offer to purchase. If there was any reasonable doubt relative to litigation regarding the title, then the property was not "marketable". Culligan v. Leider, 65 Cal.App.2d 51, 58, 149 P.2d 894. In Heymann v. Viane, 252 N.Y. 159, 169 N.E. 124, it was held that as long as a tax remained unfixed and unpaid, the realty was not marketable.

It is also apparent that the defendants by their letter of October 11, 1947, to the First National Bank of Vista terminated the escrow in accordance with the express provision of the escrow instructions providing for a written demand for the return of money and/or instruments deposited by them in the event that the conditions had not been complied with on the closing date of October 10, 1947.

Since we have determined that the court erred in decreeing specific performance under the conditions shown herein, it is not necessary for us to decide the other questions raised by the parties on these appeals.

The judgments are reversed. Defendants to recover their costs.

GRIFFIN, Acting P. J., concurs.

95 Cal.App.2d 586

DAVIS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 17464.

District Court of Appeal, Second District, Division 3, California.

Jan. 16, 1950.

Proceeding in prohibition by Brian James Davis against the Superior Court of the State of California, in and for the County of Los Angeles, to prevent a hearing by the court of an order to show cause in re attorney's fees, costs, and alimony in a divorce action.

The District Court of Appeal, Wood, J., held that petition for writ of prohibition to dismiss an order to show cause directed against petitioner, after he was granted interlocutory judgment of divorce, for attorney's fees, costs, alimony pendente lite, and allowance for child's support, upon grounds that relief sought was waived by property settlement, and that trial court was deprived of jurisdiction in matter by appeal from granting of motion to set aside interlocutory judgment, was insufficient.

Demurrer to petition sustained, alternative writ of prohibition discharged, and petition for a writ of prohibition denied.

1. Divorce 🔑182

Where husband secured interlocutory judgment of divorce on default providing that parties had settled all their property rights including all claims for support and wife's motion to set aside decree on ground that after entry of judgment she discovered that she was pregnant by husband was granted, an appeal by husband from granting of that motion did not divest trial court of jurisdiction in matter of a motion for an order to show cause, to make an award for attorney's fees, costs, alimony pendente lite, and support of the child. Code Civ.Proc. § 473; Civ.Code, § 137.

2. Prohibition 🔑9

The writ of prohibition will not issue where lower tribunal is not proceeding without or in excess of its jurisdiction.

3. Prohibition 🔑20

Where husband secured interlocutory judgment of divorce on default providing that parties had settled all their property rights including all claims for support and appealed from granting of wife's motion to set aside decree on ground that she discovered after entry of judgment that she was pregnant by husband, husband's petition for prohibition to dismiss order to show cause to make an award for attorney's fees, costs, alimony pendente lite, and support of child, upon grounds that relief sought was waived by property settlement, and that trial court was deprived of jurisdiction in matter by appeal, was insufficient. Code Civ.Proc. § 473; Civ.Code, § 137.

◆

N. E. Youngblood, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

WOOD, Justice.

Proceeding in prohibition. The petition shows that on June 3, 1949, the petitioner herein filed an action for divorce against Bonita Fiedler Davis. On June 9th the defendant appeared in the action and stipulated that her default be taken and that the action be heard as a default. On June 28th her default was entered, and on July 22nd an interlocutory judgment of divorce was granted to petitioner and the judgment was entered on that date. The judgment approved a property settlement agreement, dated May 26, 1949, which provided that the parties had settled all their property rights including all claims of either party upon the other for support or maintenance. On September 6th the defendant Mrs. Davis filed a motion, pursuant to the provisions of section 473 of the Code of Civil Procedure, to set aside her default, the interlocutory judgment, and the property settlement agreement. The motion was made upon the ground that she was pregnant by the petitioner, and she expected to give birth to a child in January or February, 1950; and that she discovered, after the interlocutory judgment had been entered, that she was pregnant. At the time of filing said motion she filed a proposed answer and cross-complaint to petitioner's complaint for divorce and alleged therein that the date of separation was September 12, 1948. On September 19, 1949, her said motion was granted. On September 21, 1949, she filed an amended cross-complaint and alleged that the date of separation was May 27, 1949. The order granting the motion was entered on September 26, 1949, and on that date the petitioner filed a notice of appeal "relating" to said order. On October 17th defendant Mrs. Davis obtained an order to show cause, directed against petitioner, "for" attorney's fees, costs, alimony pendente lite, and allowance for child support and "custody." On October 25th, at the time set for the hearing on the order to show cause, the petitioner filed a written special appearance for the purpose of objecting to the court's jurisdiction, and for the purpose of moving for a dismissal of the order to show cause, upon the ground that the relief sought by the order had been waived by the property settlement, and upon the further ground that the trial court was deprived of jurisdiction in the matter pending appeal. The motion to dismiss was denied, and the objection was overruled. The matter was partially heard on said date and was continued to November 10, 1949. On November 2, 1949, the petitioner filed an answer to the amended cross-complaint in which he alleged that he separated from defendant on September 1, 1948.

Respondent herein demurred to the petition for a writ of prohibition upon the ground that it did not state facts sufficient to entitle the petitioner to such writ.

[1] Petitioner contends that the trial court does not have jurisdiction in the order to show cause proceeding, for the reason that the appeal by petitioner divested the court of jurisdiction. The trial court had jurisdiction, in the matter of the order to show cause, to make an award for attorney's fees, costs, alimony pendente lite, and support of the child. Section 137 of the Civil Code provides in part: "When an action for divorce is pending, the court may, in its discretion, require the husband * * * to pay as alimony any money necessary to enable the wife * * * to support herself and her children * * * or to prosecute or defend the action." When the order to show cause herein was filed and partially heard the parties were husband and wife and the action was pending within the meaning of said section 137. See Nelson v. Nelson, 7 Cal.2d 449, 453, 60 P.2d 982; Armstrong v. Armstrong, 81 Cal.App.2d 322, 325, 183 P.2d 905; Bernard v. Bernard, 79 Cal.App.2d 353, 358, 179 P.2d 625.

[2] The "writ of prohibition will not issue where the lower tribunal is not proceeding without or in excess of the jurisdiction of such tribunal." Rausch v. Superior Court, 40 Cal.App.2d 707, 708, 105 P.2d 627, 628.

[3] The demurrer to the petition is sustained, the alternative writ of prohibition is discharged, and the petition for a writ of prohibition is denied.

SHINN, P. J., and VALLÉE, J., concur.

95 Cal.App.2d 614

ARNOLD v. BERNAY et al.

Civ. 17358.

District Court of Appeal, Second District, Division 1, California.

Jan. 18, 1950.

Hearing Denied March 16, 1950.

Action by Madge Arnold against Eric Bernay and others for injuries sustained when struck by an automobile while walking across an intersection.

The Superior Court, Los Angeles County, James M. Allen, J., found that at time of accident the named defendant was owner of automobile involved and automobile was driven by another with consent of named defendant's bailee and the named defendant appealed from that portion of the judgment directed against him.

The District Court of Appeal, Drapeau, J., held that named defendant, having delivered automobile to buyer together with bill of sale and endorsed certificate of ownership, was not liable for plaintiff's injury.

Portion of judgment appealed from reversed.

Automobiles ⚿56

Where seller had delivered automobile to buyer together with bill of sale and endorsed certificate of ownership, seller was not liable to plaintiff for injuries sustained by her when struck by such automobile driven by another defendant with consent of subsequent owner, although registration of automobile in transferee had not been completed. Vehicle Code, §§ 177, 178, 186, 402.

Kenny & Morris, Los Angeles, for appellant.

Samuel A. Rosenthal, Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiff sued defendants to recover damages for personal injuries sustained by her on March 15, 1947, while walking across the intersection of Pico and Centinela Boulevards in the City of Santa Monica, when she was struck by an automobile being driven by defendant Glenn L. Caskey.

At the conclusion of the trial the court found that at the time of the accident, defendant Eric Bernay was the owner of the car involved, a 1941 Chrysler sedan bearing 1946 New York State license No. 5EB; that at the said time, defendant Harry G. Brown, a minor, was the bailee of the automobile with the consent and permission of its owner, Eric Bernay; and that defendant Glenn L. Caskey was driving it with the knowledge, permission and consent of said bailee and in his presence.

Judgment was rendered in favor of plaintiff for (a) $10,123.00 against Glenn L. Caskey; and (b) $5,000.00 against defendants Harry G. Brown, Ina F. Caskey and Eric Bernay, the latter's liability, as owner, for the payment of the judgment being limited to $5,000.00 under section 402 of the Vehicle Code.

Defendant Eric Bernay alone appeals from that portion of the judgment directed against him, urging that by the following specific acts he had divested himself of ownership of the automobile and was therefore protected from the statutory liability imposed by section 402 of the Vehicle Code for injuries sustained by respondent:

1. Actual notice of the transfer to Department of Motor Vehicles;

2. Surrender of possession of the automobile;

3. Delivery of an endorsed certificate of ownership (the pink slip).

It appears from the record that appellant Bernay, who was a resident of New York State, departed from California early in February of 1947, leaving the 1941 Chrysler in the hands of Edward H. Laguna with authority to sell it. Thereafter Laguna left the car with Glenn M. Frink at the latter's service station in Inglewood. On February 26th, Bernay executed and forwarded to Laguna a bill of sale transferring the automobile to Frink, and also forwarded the New York registration certificate endorsed in blank. Laguna immediately delivered these documents to Frink.

On March 5, 1947, Frink and Harry G. Brown visited the Los Angeles office of the Department of Motor Vehicles, when the department issued Verification of Vehicle, and demanded that a bill of sale be obtained from the original owner of the Chrysler, i. e., Royal Motors Company, a New York new-car dealer. On this same date, Frink delivered the car to Harry G. Brown, accepting a down payment of $400 for which he issued a receipt. On March 13th or 14th, Laguna received the bill of sale from Royal Motors Company to Bernay, which he delivered to Frink.

The accident out of which the instant action arises occurred on Saturday evening, March 15th, when the Chrysler was being operated by defendant Glenn L. Caskey in the company of defendant Harry G. Brown.

Thereafter on March 21, 1947, Frink executed and delivered his bill of sale of the automobile to Charles B. Brown, father of Harry G. Brown, receiving from the Browns the sum of $1050, of which sum Frink paid appellant Bernay the sum of $850, less license and transfer fees.

An application for California registration of nonresident automobile bears the Department of Motor Vehicles "Received" stamp of March 25, 1947, on which date the department issued a certificate of ownership (pink slip) to Charles B. Brown. Finally on May 1, 1947, the department issued a pink slip to Harry G. Brown, pursuant to the endorsement of his father, Charles B. Brown, on the reverse side of the March 25th certificate.

The witness Glenn M. Frink testified that on March 5, 1947, accompanied by Harry G. Brown, he took the bill of sale from Bernay to himself and also the New York certificate of ownership to the Department of Motor Vehicles in order "to consummate the sale of the automobile to Harry Brown, and with it, the transfer from New York to California registration." That he presented the documents to the department and requested that the automobile be transferred to Mr. Brown at that time; that the department did not comply with his request; that Mr. Brown paid him $400.00 and he gave possession of the car to Mr. Brown on that day, March 5, 1947, and that so far as he was concerned, "it was a sale."

At the time of the accident, the conditions by the performance of which appellant might have terminated the statutory liability imposed upon him by said section 402, were prescribed by sections 177 and 178 of the Vehicle Code:

Sec. 177(a). "Whenever the owner of a vehicle registered hereunder sells or transfers his title or interest in, and delivers the possession of, said vehicle to another, said owner shall immediately notify the department of such sale or transfer giving the date thereof, the name and address of such owner and of the transferee and such description of the vehicle as may be required in the appropriate form provided for such purpose by the department."

Sec. 178. "An owner who has made a bona fide sale or transfer of a vehicle and has delivered possession thereof to a purchaser shall not by reason of any of the provisions of this code be deemed the owner of such vehicle so as to be subject to civil liability for the operation of such vehicle thereafter by another when such owner in addition to the foregoing has fulfilled either of the following requirements:

"(1) * * * When such owner has made proper indorsement and delivery of the certificate of ownership and delivered the certificate of registration as provided in this code.

"(2) * * * When such owner has delivered to the department or has placed in the United States mail, addressed to the department, either a notice as provided in Section 177 or appropriate documents for registration of such vehicle pursuant to such sale or transfer."

It is further provided by section 186 of the Vehicle Code, that "No transfer of the title or any interest in or to a vehicle registered hereunder shall pass and any attempted transfer shall not be effective unless and until the parties thereto have fulfilled either of the following requirements:

"(1) (*Endorsement and delivery of certificate, and delivery of card, and application for transfer of registration.*) * * *

"(2) The transferor shall have delivered to the department or shall have placed in the United States mail addressed to the department the appropriate documents for the registration or transfer of registration of such vehicle pursuant to such sale or transfer except as provided in Section 178."

In Smith v. Western Casualty, etc., Co., 60 Cal.App.2d 508, 512, 141 P.2d 10, 12, the following rule is enunciated:

"The language 'except as provided in sections 178' so modifies the preceding language of sec. 186 that its effect is that upon delivery of the automobile and the endorsed certificate the title does pass to the transferee so as to make the transferee the owner, and to divest the transferor of his ownership, (to quote the language of sec. 178), 'so as to be subject to civil liability for the operation of such vehicle thereafter by another.'

"Upon such delivery the transferee becomes the owner for the purpose of fixing liability for the operation of the car by another under sec. 402, Vehicle Code, St. 1935, p. 153 (Ferroni v. Pacific Finance Corp., 21 Cal.2d 773 [778], 135 P.2d 569), and the transferor ceases to be owner for that purpose (Piacun v. Hexem, 18 Cal. App.2d 145, 63 P.2d 315)."

In the case of Weinberg v. Whitebone, 87 Cal.App.2d 319, 325, 326, 196 P.2d 963, 966, where an owner dealer made an unconditional sale without delivering the certificate of ownership to the transferee, the court, after quoting from Smith v. Western Casualty etc. Co., supra, commented as follows:

"It must be noted that it is not only the delivery of the automobile but likewise the certificate. The transferee in this case, though he paid cash for the possession of the motor vehicle, was not 'subject to civil liability for the operation of such vehicle' until the endorsed certificate passed from the dealer to the purchaser of the vehicle. * * *

"There is a period of time in some instances following the transfer of title and possession of a motor vehicle when legally and factually it appears difficult to determine responsibility for injuries resulting from accidents. The Legislature has given an opportunity to the vendor to avoid liability by compliance with the statutory provision to endorse and deliver the registration slip to the vendee or by delivering to the department the data set forth in section 177 or by forwarding appropriate documents for the new registration. The duty of registration is primarily imposed upon the buyer (sec. 179), but the failure to deliver the registration card to Feuerhelm (the buyer) prevented him from attempting to comply with the law. The dealer's acceptance of a power of attorney to effectuate the change of ownership could not relieve the dealer of his duty to comply with the statute."

Applying the foregoing rules of law to the factual situation here presented, it is clear that appellant had divested himself of ownership in the Chrysler before it was involved in the accident by delivering the automobile to defendant Frink, together with a bill of sale and the endorsed certificate of ownership. It is also clear that had it not been for the demand of the Motor Vehicle Department for an additional bill of sale, the registration of the automobile in the transferee Brown would have been completed on March 5, 1947.

That portion of the judgment appealed from is reversed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; CARTER and SPENCE, JJ., dissenting.

95 Cal.App.2d 692

BREAKS et ux. v. ANDERSON et ux.

Civ. 14099.

District Court of Appeal, First District,
Division 2, California.
Jan. 24, 1950.

Hearing Denied March 23, 1950.

Richard D. Breaks and Josephine Breaks, husband and wife, sued Raymond W. Anderson and Irma Irene Anderson, husband and wife, for injuries sustained by plaintiff wife when struck by defendants' automobile.

A judgment in favor of the defendants was entered by the Superior Court of San Mateo County, Edmund Scott, J., and the plaintiffs appealed.

The District Court of Appeal, Nourse, P. J., held that no prejudicial error was committed by trial court in the instructions given and refused.

Judgment affirmed.

1. Trial ⟹228(3)

Requested instruction that while it was duty of both driver of motor vehicle and pedestrian, using public roadway, to exercise ordinary care, that duty did not require necessarily the same degree of caution from each was erroneous in using word "caution", which had same meaning as "care" instead of word "amount," and refusal to give such instruction was not error.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Care" and "Caution".

2. Negligence ⟹65

The "degree of care" required of a person for his own safety is always the same, that is, ordinary care, but, in some circumstances, the "quantum or amount of care" required to reach the degree of ordinary care is greater than in others.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Degree of Care" and "Quantum or Amount of Care".

3. Trial ⟹260(8)

Refusal of plaintiff's requested instruction that while it was duty of both driver of motor vehicle and pedestrian, using public roadway, to exercise ordinary care, that duty did not require necessarily the same degree of caution from each was not prejudicial error, even if instruction had not improperly used word "degree" instead of "quantum" or "amount," where trial court properly instructed jury that both parties were required to use ordinary care but that the amount of caution required will vary in accordance with surrounding circumstances.

4. Trial ⟹286

An instruction covering "imminent peril" given at defendant's request was not erroneous on ground that it advised jury that defendant had to use less care, and had to exercise less caution, than plaintiff.

5. Appeal and error ⟹1064(1)

In action for injuries sustained by pedestrian when struck by automobile, statement in instruction that defendants were not insurers of other persons using the highway, which statement was merely introductory to charge covering subject of use of ordinary care, was not prejudicial.

6. Trial ⟹267(3)

Striking from plaintiff's proposed instruction on burden of proof that portion which instructed jury that plea of contributory negligence was an affirmative defense and that burden rested on defendants to establish it, was error but was not prejudicial, where instructions, as a whole, told jury that burden of proof was on party to sustain "his or her side" of each issue of fact, and jury could not have misunderstood instructions on such point.

◆

Melvin M. Belli, Lou Ashe, John Brettmann, San Francisco, attorneys for appellants.

Bronson, Bronson & McKinnon, San Francisco, attorneys for respondents.

NOURSE, Presiding Justice.

Mrs. Breaks and her companion alighted from a car at the intersection of Middle Road with El Camino Real north of the main part of the town of Belmont. They walked south on the east side of the highway to a point approximately midway between Middle Road and the Ralston Street intersection. The sidewalk was rough and covered with gravel. The sidewalk on the west side of the highway appeared to be better and they crossed the highway to reach the western sidewalk. El Camino Real was at that point a four lane through highway marked with a double line in the center and two single lines marking each lane. The time was between 9:30 and 10 P. M. of a Saturday night. Before they left the easterly curb the two ladies observed the lights of an approaching car. They stopped at the double center line and again at the single line dividing the two southbound lanes and at both times saw the approaching lights of respondent's car. They continued to a point near the westerly curb where Mrs. Breaks was struck by the car and seriously injured. She and her husband sued Anderson and his wife. We will hereafter refer to her as appellant and refer to Mr. Anderson as respondent.

On the issue of negligence the evidence was that defendant was traveling at a speed of approximately thirty-five miles an hour in a thirty-five mile zone. His lights were in good order, and no evidence was offered tending to show inadequate brakes or other mechanical defects. He first saw the parties when he was about seventy-five feet from them and applied his brakes when between seventy-five and forty feet away. There was some testimony that the ladies walked at a "brisk" pace to the line of the westerly lane and then ran across that lane to the curb. This is the evidence upon which plaintiffs relied to support their charge of negligence. There is no material conflict.

On this evidence the jury returned a verdict that defendant was "not guilty" from which it may be assumed that they found that the charges of negligence were not proved.

[1, 2] The appeal is grounded on asserted errors in instructions given and refused. Appellant complains of the refusal of the trial court to give her proposed instruction reading in part: "While it is the duty of both the driver of a motor vehicle and a pedestrian, using a public roadway, to exercise ordinary care, that duty does not require necessarily the same degree of caution from each." The proposed instruction was not a correct statement of the law. Since there is no distinction in the meaning of the words "care" and "caution" when used in this connection, it would have been error to have instructed the jury that the parties were not required to use the same *degree* of care, or caution. There is no difference in the "degree" of care required. It is the "amount" of care which is the controlling factor. The rule is clearly stated in Lasater v. Oakland Scavenger Co., 71 Cal. App.2d 217, 221, 162 P.2d 486, 487, as follows: "Appellants proposed an instruction that by reason of the fact that she was dressed entirely in black she should have used 'a greater degree of care' for her own safety. The instruction was erroneous in using the word 'degree' instead of 'quantum' or 'amount.' The degree of care required of a person for his own safety is always the same, i. e. ordinary care, although in some circumstances the quantum or amount of care required to reach the degree of ordinary care is greater than in others. While neither courts nor lawyers have uniformly observed this distinction in terminology, it is a substantial one and well established in our law [citing cases]."

[3] Furthermore the trial court properly instructed the jury, at respondent's request, that both parties were required to use ordinary care (the degree of care) but that "the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances."

[4] Appellant complains of the instruction covering "imminent peril" given at the request of respondent. She states that it advised the jury that "defendant had to use less care, and had to exercise less caution, than plaintiff." Appellant's argument is based on a misconstruction. What the court said was that one confronted with a sudden peril was not required "to exercise more care or diligence than an ordinarily prudent man would exercise under the same circumstances of sudden peril and imminent danger." The instruction applied to both parties.

[5] Criticism is made of the instruction stating that defendants were not insurers

of other persons using the highway. The statement was merely introductory to the charge covering the subject of use of ordinary care, and was not prejudicial.

[6] Appellant proposed an instruction on the burden of proof, reading: "The defendants in this action have set up in their answer the plea of contributory negligence. You are instructed that such plea is an affirmative defense, and the burden of proof rests on the defendants Raymond W. Anderson and Irma Irene Anderson to establish it, if any. You are not to assume the existence of contributory negligence in the absence of evidence, merely from its being pleaded by the defendant, and contributory negligence, if any, must proximately cause injury before it can bar a right to recovery." The trial court gave the last part but eliminated the first two sentences as already "covered." The instruction as a whole was proper and should have been given. The question remains whether the subject matter was covered and, if it was not, whether the refusal was prejudicial.

The trial judge gave appellant's proposed instruction covering burden of proof in general terms. It also gave respondent's proposed instructions covering burden of proof on appellant to prove respondent's negligence. It gave appellant's proposed instruction that "a party has succeeded in carrying his or her burden of proof on an issue of fact, if the evidence favoring his or her side of the question is more convincing than that tending to support the contrary side. * * *" The portion stricken from appellant's proposed instruction does not appear to have been given in similar language. Though we conclude that the portion of the proposed instruction should have been given, it is apparent that appellant suffered no prejudice since all the evidence tending to prove her contributory negligence came from her and from her own witnesses. Under these circumstances there was really no question of the burden of proof. The instructions given did not tell the jury that it must find that appellant "was without fault or negligence" as in Rush v. Lagomarsino, 196 Cal. 308 and cases cited on page 314, 237 P. 1066, 1067. Unless contributory negligence is "shown by or can be inferred from the evidence adduced in support of the plaintiff's case" an instruction on the burden of proof should be given as pointed out in the Rush case. This is the controlling factor here. All the evidence upon which the plea of contributory negligence could have been proved was a part of "plaintiff's case."

But here the want of prejudice is apparent because the instructions as a whole told the jury that the burden of proof was on the party to sustain "his or her side" of each issue of fact. Having fully advised the jury as to which issue or "side" was maintained by the respective parties the jury could not have misunderstood the instructions on this point.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

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95 Cal.App.2d 631

PEOPLE v. MILLER.

Cr. 684.

District Court of Appeal, Fourth District, California.

Jan. 18, 1950.

Rehearing Denied Jan. 27, 1950.

Joseph R. Miller was convicted in the Superior Court of County of San Bernardino, A. D. Mitchell, J., of burglary in the second degree, and he appealed from the judgment and from the order overruling demurrer to the information, from the order denying his motion of arrest of judgment and from the whole record.

The District Court of Appeal, Mussell, J., held that a phone booth was a "building or structure" within burglary statute.

Judgment and order denying motion for a new trial affirmed and appeal from the other orders dismissed.

1. Burglary 🔑**4**

A "house" within burglary statute is any structure which has walls on all sides and is covered by a roof or which has a capacity to contain, and is designed for habitation of man or animals, or sheltering of property. Pen.Code, § 459.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "House".

2. Burglary 🔑4

A phone booth which had walls on four sides, a roof and a floor, three walls of which were solid and on fourth side there was a door, with a small width of board from floor to roof between edges of the door and the side walls, was a "building or structure" within burglary statute although the fourth wall consisted for the most part of a glazed door. Pen.Code, § 459.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Building or Structure".

3. Criminal law 🔑1023(8)

An order overruling defendant's demurrer to the information is not an appealable order. Pen.Code, § 1237.

4. Criminal law 🔑1023(12)

An order denying defendant's motion in arrest of judgment is not an appealable order. Pen.Code, § 1237.

5. Criminal law 🔑1023(1)

Appeal does not lie in a criminal case from the whole record. Pen.Code, § 1237.

Stephen W. Edwards, San Bernardino, for appellant.

Fred N. Howser, Attorney General, Norman H. Sokolow, Deputy Attorney General, for respondent.

MUSSELL, Justice.

The defendant was accused in three counts in an Information filed by the District Attorney of the County of San Bernardino of the crime of Burglary of a phone booth. He was tried by the court without a jury and found guilty of Burglary in the second degree. The sole contention of the defendant is that the evidence was insufficient to show that the structure in question could be burglarized.

The evidence produced by the prosecution was that the California Water and Telephone Company maintained a phone booth at Angel Cafe, Morongo Valley, in San Bernardino County. The structure was fastened directly to the cafe building and was a standard telephone booth containing a pay telephone. The booth contained an alarm in the phone box to notify the company of attempted thievery of the money therefrom, and aniline dye in dry powder form was placed in the coin box and sprinkled on the money therein. The effect of the dye, when coming in contact with the skin, is to produce a purple discoloration difficult to wash off.

The defendant drove up to the cafe, opened the door of the telephone booth and with a large hammer broke the coin box and took the money therefrom. Shortly thereafter the defendant was apprehended and at the time of his arrest, his hands and clothing were found to be discolored with the aniline dye. The arresting officers also found the same purple discoloration on the hammer and a coin found in defendant's possession.

The defendant admitted breaking into the telephone booth and removing the money on the dates specified in the three counts of the Information and the sufficiency of the evidence to sustain a conviction is attacked on the sole ground that a telephone booth is not a building within the meaning of Penal Code, section 459, which section provides: "Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach as defined by the Vehicle Code, vehicle as defined by said code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary."

The Information charged that the defendant wilfully, unlawfully and feloniously entered a "phone booth", occupied by the California Water and Telephone Company, and a Demurrer was filed thereto, after which it was stipulated by the District Attorney, the defendant and his counsel that the Information be amended more particularly describing the telephone booth in the following language: "The phone booth being a structure having a square roof and a square floor with a distance of 74" between them. Between three of the corresponding edges of the floor and roof run solid walls. For purposes of terminology, the two of these three walls that face each other shall be referred to as the side walls, the third wall, which is connected to both of the side walls, shall be referred to as the back wall. To the exposed edge of one side wall, that is the edge that is attached neither to the roof, the floor nor the back wall, is attached a board. The width of this board runs parallel to the back wall, its thickness runs parallel to the side walls and its length runs from the floor to the ceiling. This board projects at right angles from the side wall to which it is attached toward the opposite side wall. Onto the exposed edge of this board that projects toward the opposite wall is hung a door. To the exposed edge of the opposite side wall is attached a similar board in a similar manner. Without the door, there is an aperture between these two boards and between the roof and floor which is 74" x 23". The inside distance between the side walls is 27". The inside distance between the floor and roof is 74". The door is hinged in the middle. When closed it completely fills the 74" x 23" aperture. When open its two sections fold together and lie against one of the side walls. When the door is fully open the aperture is 74" x 21½"."

"The phone booth being outside of the building of the Angel Cafe and so placed that the back wall of the phone booth is against a side wall of the building of the Angel Cafe."

The booth as described in the amended Information is a building or a structure within the terms of Section 459 of the Penal Code.

[1] In People v. Burley, 26 Cal.App.2d 213, 214, 79 P.2d 148, 149, the court, when considering whether a popcorn stand, 8 feet wide, 10 feet long and 7 feet high, with four walls and a roof, was a building or structure within the terms of section 459 of the Penal Code, said: "* * * a house, in the sense of the statute in question herein, is held to be 'any structure which has walls on all sides and is covered by a roof' (People v. Buyle, 22 Cal. App.2d 143, 70 P.2d 955; People v. Franco, 79 Cal.App. 682, 250 P. 698; People v. Jackson, 131 Cal.App. 605, 21 P.2d 968), and a building could well be described in the same manner."

[2] An examination of the description added by the amendment to the Information shows that the structure in the instant case had walls on four sides, a roof and a floor. Three walls were solid and on the fourth side there was a door with a small width of board from floor to roof between the edges of the door and the side walls. The fact that the fourth wall consisted for the most part of a glass door does not exclude it from the classification of a wall within the meaning of the code section.

The phone booth satisfies another definition of a building as noted in People v. Buyle, 22 Cal.App.2d 143, 149, 70 P.2d 955, 959, where it is said that a building has been defined as "a structure which has a capacity to contain, and is designed for the habitation of man or animals, or the sheltering of property."

[3-5] The defendant appealed herein from the judgment and from the order denying his motion for a new trial. He attempted to appeal from the order overruling the demurrer, from the order denying his motion of arrest of judgment and from the whole record. There is no appeal by defendant from an order overruling the demurrer, from an order denying motion in arrest of judgment nor from the whole record. Pen.Code, Sec. 1237; 4 Cal.Jur.Supp. 900, 902; People v. Battilana, 52 Cal.App.2d 685, 698, 126 P.2d 923; People v. Wortman, 137 Cal.App. 339, 341, 30 P.2d 565.

The judgment and the order denying the motion for a new trial are affirmed and the attempted appeal from the other orders is dismissed.

GRIFFIN, Acting P. J., concurs.

95 Cal.App.2d 659

BOUCHER v. AMERICAN BRIDGE CO.

No. 14205.

District Court of Appeal, First District,
Division 1, California.
Jan. 20, 1950.

Action by Richard Boucher, employee of one independent contractor, against American Bridge Company, another independent contractor, for damages for personal injuries suffered in fall from unsecured truss on mill put in place by defendant.

The Superior Court of Contra Costa County, Benjamin C. Jones, J., entered judgment for plaintiff, and defendant appealed.

The District Court of Appeal, Bray, J., held inter alia, that evidence sustained finding that plaintiff was impliedly invited to use the truss, and that he was entitled to rely on custom that steel aloft was always secured, but that court should have given instructions as to whether plaintiff was an invitee, licensee or trespasser with knowledge.

Judgment reversed.

1. Negligence 🔑32(2.10)

Where employees of independent electrical contractor used ladders belonging to independent steel contractor as well as their own ladders, and were not told not to use an unsecured truss in following up steel workers and completing electrical work in building, there was an implied invitation to employee of electrical contractor by steel contractor to use unsecured truss from which he fell to get to nearest ladder.

2. Negligence 🔑30

Where employee of independent electrical contractor fell from an unsecured truss put in place by independent steel contractor while approaching a ladder belonging to steel contractor, and employee was impliedly invited to use truss, evidence that custom in steel construction work that steel aloft was always secured and that employee and other electricians always relied on that custom, supported a finding of negligence of steel contractor for leaving sag rods unsecure without some warning to electricians.

3. Negligence 🔑136(1, 26)

Where employee of independent electrical contractor fell from unsecured truss while approaching ladder belonging to independent steel contractor which employee had implied invitation to use, and custom of construction was that steel aloft was always secured, employee did not assume risk, and was not contributorily negligent as a matter of law.

4. Appeal and error 🔑1067
Negligence 🔑138(1)

In action by employee of independent electrical contractor against independent steel contractor for damages resulting in fall from unsecured truss, failure to instruct jury as to question of whether employee had a right to be on truss or was a trespasser was reversible error.

5. Negligence 🔑139(1, 7)

In action by employee of independent electrical contractor against independent steel contractor for injuries sustained in fall from unsecured truss, instruction that if defendant neither knew nor had reason to know that employee would use truss, defendant was under no duty to warn him not to use it, was not sufficient to instruct jury that employee must have been more than a tresspasser before any duty at all, either to install the truss in a rigid position or to warn of its insecurity would arise.

6. Negligence 🔑32(2)

A "licensee" comes on land by consent or permission, but usually for purposes of his own, having no relation to business of the owner or occupant.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Licensee".

7. Negligence 🔑32(2.3)

An "invitee" enters at the express or implied invitation of occupant for a purpose of common interest or mutual benefit to owner or occupant and himself, or in connection with business of occupant.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Invitee".

8. Negligence 🔑32(1), 105

Duty of licensor to licensee is practically no greater than that owed to a trespasser, and licensee assumes risks incident to condition of the premises, and can recover only for wilful or wanton injury unless presence of licensee is or should reasonably be known, where licensor has a duty to carry on activities with reasonable care.

9. Negligence 🔑32(1)

The duty owed an invitee or business visitor by a landowner is to exercise ordinary care to keep premises in a reasonably safe condition.

10. Negligence 🔑32(2)

A "licensee" is a person who is privileged to enter or to remain upon land by virtue of possessor's consent whether given by invitation or permission.

11. Negligence 🔑32(2.8, 2.12)

A "gratuitous licensee" is any licensee other than a "business visitor", and a "business visitor" is a person who is invited or permitted to enter or remain on land in possession of another for a purpose directly or indirectly connected with business dealings between them.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Business Visitor" and "Gratuitous Licensee".

12. Negligence 🔑32(1)

A possessor of land is subject to liability to licensees, whether business visitors or gratuitous licensees, for bodily harm caused to them by his failure to carry on his activities with reasonable care for their safety, unless licensees know or from facts known to them, should know of possessor's activities and of risk involved therein.

13. Negligence 🔑48, 52

A possessor of land is subject to liability to bodily harm caused to gratuitous licensees by a natural or artificial condition thereon if, but only if, he knows of condition and realizes that it involves an unreasonable risk to them and has reason to believe that they will not discover condition or realize risk, and invites or permits them to enter or remain upon land without exercising reasonable care to make condition reasonably safe, or to warn them of condition and risk involved therein.

14. Negligence 🔑50

The main difference between duty owed a licensee and that owed business visitor or invitee by a landowner is that in addition to using ordinary care not to harm invitee or business visitor, landowner must use reasonable care to discover conditions which might cause such harm.

15. Negligence 🔑33(1, 2)

A "trespasser" is one who enters or remains on land without privilege or consent, and duty owed a trespasser by landowner is merely to refrain from wilful or wanton injury to him.

See Words and phrases, Permanent Edition, for other judicial constructions and definitions of "Trespasser".

16. Negligence 🔑33(1), 52

Where landowner knows or should know that a trespasser has come on his land, he has duty to warn trespasser of concealed dangers and to exercise reasonable care in carrying on activities.

17. Negligence 🔑32(1)

A licensee may recover from a landowner for active negligence or an overt act of negligence, as distinguished from passive negligence.

18. Negligence 🔑136(15)

Where employee of independent electrical contractor was injured in fall from unsecured truss put in place by independent steel contractor, whether plaintiff was on truss with permission, express or implied, or toleration of steel contractor was for jury.

19. Negligence ⟹32(1, 2.10)

Where independent electrical contractor followed up independent steel contractor in construction of a building, as to owner, they were each "invitees," and as to each other they were strangers between whom there was no privity of contract, and as such contractors, they owed to employees of each other same duty of exercising ordinary care for their safety during progress of work as they owed to public generally.

20. Negligence ⟹32(1)

Where independent electrical contractor followed up independent steel contractor in construction of building, duty of care owed by two independent contractors to each other was not only to refrain from infliction of willful or wanton injury, but to exercise ordinary care for safety of employees of other contractor on building.

21. Negligence ⟹32(2), 136(15)

A person may be an invitee as to one portion of premises, and a mere licensee or a trespasser as to others, but question as to extent of invitation is for jury.

22. Negligence ⟹32(3)

Where employee of independent electrical contractor fell from unsecured truss put in place by independent steel contractor, if employee went beyond scope of his invitation from owner, and was not invited to location by contractor in charge, he lost his status as invitee of owner and his equal footing with the other contractor, and would not recover from steel contractor.

23. Negligence ⟹136(15)

Where employee of independent electrical contractor fell from unsecured truss put in place by independent steel contractor, whether employee was an invitee of steel contractor, or a licensee, or trespasser with knowledge was for jury.

24. Negligence ⟹138(1)

Where employee of independent electrical contractor fell from unsecured truss put in place by independent steel contractor on building, court erroneously failed to give instructions to enable jury to determine whether employee was a trespasser whom defendant did not know or have reason to know might use truss.

Walter Shelton, San Francisco, James F. Hoey, Martinez, for appellant.

Palmquist & Sugden, Stanley C. Smallwood, Oakland, for respondent.

BRAY, Justice.

In an action for damages for personal injuries, a jury verdict awarded plaintiff $18,600. From the judgment entered thereon, and after denial of a motion for new trial, defendant appealed.

Questions Involved.

Primarily the questions involved depend upon the duty owed in the construction of a building by one independent contractor to the employees of another independent contractor. The questions raised are: (1) alleged insufficiency of the evidence to prove negligence on the part of defendant; (2) alleged assumption of risk by plaintiff; (3) alleged contributory negligence by plaintiff; (4) alleged error in refusal of certain instructions.

Facts.

There is practically no conflict in the facts as to the accident. There is some conflict on the question of plaintiff's right to be at the point from which he fell. Columbia Steel Company was building a mill near Pittsburg, California. Defendant was employed to furnish and erect the structural steel framework. Plaintiff was an employee of Fischbach & Moore, who were employed to install the electrical work on the steel framework. The roof structure was under construction, and as the structural steel was put up, plaintiff and his fellow employees followed with their electrical installation. Starting from the west end of the building, there was a steel truss every 20 feet, set across the building, from side to side (north and south). Each truss was in the form of a triangle, that is, there was a horizontal beam running parallel to and about 35 feet from the ground and two others sloping upwards to form a peak. Between the base and the other two parts were vertical and diagonal bracings. The distance between two trusses is called a "bay" and was in this case 20 feet. On top of the upper arm of the trusses, and crosswise to them (parallel to the length of the building) are attached "purlins." Each is about 8 inches deep and has two 3-feet flanges, facing the same direction. They are placed with the flanges facing up the slope toward the peak of the roof, and are spaced about 5 feet apart, going from the peak of the roof down to the eave at the side of the building. It is upon these purlins that the roofing eventually rests. However, no roofing had been placed on the building at the time of the accident here involved. In order to strengthen the purlins, "sag rods" are used. They run crosswise to the purlins (parallel with the trusses—north to south) and are about ¾ of an inch in diameter. Holes are drilled in the purlins, a rod is placed joining two purlins, and nuts are screwed on the ends of the rod protruding from the holes. Two sag rods were installed in each bay (space between two trusses) about 6 feet and 9 inches from either truss.

At the time of the accident the steelworkers had moved from west to east and had installed all of the sag rods west of truss No. 23. Just east of truss No. 23 sag rods had been placed on top of the purlins but not attached permanently. They were placed with the lower end resting on the lower flange of a purlin and the upper end resting on top of the next purlin. They were closer to truss No. 23 than would be their final permanent position. The custom in the trade was to bring up all the sag rods for one bay, resting each rod on the purlins as described, and then to put the sag rods permanently in place, working down from the peak of the roof. On the day of the accident the steelworkers began on the bay east of truss No. 23 in the afternoon after lunch, and were hoisting up the rods, laying them in the temporary position. The accident occurred at about 3:00 p. m.

The electrical workers were putting up four rows of lights extending the length of the mill, on the underside of the horizontal trusses. They worked on platforms supplied by plaintiff's employer. The contract between Columbia Steel and the electrical contractor required the latter to provide ladders and platforms for electrical workers. Plaintiff was about to descend to the ground from a platform on which he had been working. There was evidently no ladder from that same platform. In order to go down the ladder he had used in getting up, he would have had to go along 50 feet on a steel truss, 150 feet on a different scaffolding, and another 30 feet on structural steel. Plaintiff saw a ladder on the south wall of the mill, which was only about 30 feet away, and could be reached by walking along the horizontal beam of truss No. 23. He had never before walked along that truss because his work had not yet brought him into that area. However, he had never been restricted as to what ladders to use and the custom was that most trades used the most convenient ladder they saw. As he started moving along the truss toward the south side of the building he grasped braces to help support himself. He did not test each one to see if it was secure, because he depended upon a trade rule that everything set high up over an open area should be secure. As he moved toward the south side of the building he had to go around one of the braces on the truss. He held on to the brace with his right arm and reached up with his left arm, taking hold of a sag rod which he saw on top of the purlins, about 3 feet to his side. It appeared to be secure when he took it. It pulled loose, so that he had nothing holding him up, and he fell to the ground 35 feet below, landing on his feet, receiving serious injury.

At the moment of his fall, plaintiff's fellow workers did not see any steelworkers in the area. The men installing the sag rods were Jeffrey, Henley and Steadman. They testified that at the time of the accident Henley was up on the roof where the rods were being placed, Jeffrey had been on the roof and was moving down to the truss, where rods were received from below, and Steadman was on the ground, obtaining more rods.

As to the right of plaintiff to be on the unfinished truss, he testified that the steel the electricians had been working on had all been fastened down and that "we had learned to rely on the steel and knew that it was a trade practice to put everything up in a safe and workmanlike manner and so located that it would not endanger the lives of the others working in the area"; that no restrictions were placed on the electricians in the use of ladders, and that all of the trades used the "most convenient and handiest ladder" they saw; that he had taken hold of sag rods before and that he had never seen any that had not been secured, nor laid close to the top of the truss (as they were at the time of the accident). Plaintiff had worked in this particular building for about a week, 90 per cent of which time he was up on the roof structure. When asked on cross-examination if any one from defendant had ever told him it was all right to go to the place from which he fell, he answered that his employer's foreman had instructed him to go to work on this section. There is no evidence that he received any instructions from any of defendant's employees. Witness Nelson, also an electrician, testified that it was the custom in moving about the building to take hold of the framework and to rely upon the custom that "everything is secured down if it is hoisted aloft in an open area." Another electrician, Chiartano, testified to the same effect, even if steel were "brought up there temporarily."

As opposed to this testimony the defendant's superintendent, Schultz, testified that the method of leaving the sag rods temporarily unsecured was the method customarily used in this type of construction (others of defendant's employees testified to the same effect); that "My practice out there is that I would not allow any other trade to work ahead of the unfinished business—unfinished structure, I should say. We had a lot of ups and downs in that respect." He further testified that the electricians were supposed to follow up the finished part—install their electrical work on that portion of the steel structure that was finished. There is no testimony that the electricians had express permission to go on the truss in question, nor is there any testimony that they were instructed not to go on an uncompleted truss, other than the statement of the superintendent to the effect that his practice there was not to allow any other trade to work ahead of the unfinished business. This is not evidence that he or any one else had told the plaintiff or the other electricians not to work ahead of the finished steel. That the other trades did work ahead in this respect might be evidenced by the superintendent's statement, "We had a lot of ups and downs in that respect."

[1, 2] While it is not strong, there is evidence from which a jury could find that plaintiff and the other electricians were following the steelworkers, used ladders of the steelworkers as well as their own, had not been told not to use an uncompleted truss (there was no evidence of their being told when a truss was completed), and that under all the circumstances of the case there was an implied invitation to plaintiff to use the truss in question to get to the nearest ladder. The jury having found that there was such invitation, there was sufficient evidence, in view of the testimony concerning the custom that steel aloft was always secured and that the plaintiff and the other electricians always relied on that custom, to support a finding of negligence on the part of defendant in leaving the sag rods unsecure, at least without some warning to the oncoming electricians.

2, 3. Assumption of Risk and Contributory Negligence.

[3] Under the circumstances of the case, particularly in view of the testimony concerning custom and practice in the erection of steel, we cannot say as a matter of law either that plaintiff assumed the risk or that he was contributorily negligent. These were matters for the jury.

4. Instructions.

A more serious situation arises in connection with the instructions given and refused. The court instructed, in effect, that defendant owed the duty not only to refrain from the infliction of wilful and wanton injury on, but to exercise ordinary care for the safety of, plaintiff and the other employees of Fischbach & Moore; that defendant was under no duty to warn plaintiff against obvious and patent perils, if such in fact existed; that defendant was required to exercise only such care for plaintiff's safety as would not amount to a violation of the ordinary practice and custom usually followed in installing sag rods under the same or similar circumstances; that if the jury found that defendant's steel work was unfinished and still in the course of construction, "the long continued use by plaintiff of finished steel work for his support did not justify * * * [the] use by him of obviously unfinished steel work for that purpose"; that plaintiff was required to exercise the care and caution of an ordinarily prudent person and "to observe the obvious hazards of the position in which he had placed himself" and had "no right to assume that the unfinished steel work in process of construction had been completed and could be safely used for his support"; that if the jury found "the only duty of the defendant American Bridge Company was to erect the structure of steel in an orderly manner in which work of that kind should be performed and that Fischbach and Moore and plaintiff, its employee, was not to install the electrical work until after such steel had been erected, by defendant, then defendant was not under any obligation to plaintiff to depart from the normal, customary and usual methods of steel erection of this kind"; that in determining the amount of care and caution required of plaintiff for his own safety the jury might consider the custom and practice, if any, "with reference to safety precautions followed by steel framework constructors in securing and fastening steel rods or members in buildings under construction in the area where this accident occurred" if plaintiff knew of and relied on said custom; that the jury could consider the evidence, if any, as to whether defendant had violated any safety practice customarily followed in the area and known to plaintiff; that if defendant did not know and did not have any reason to believe that plaintiff would use the sag rod for his support, defendant was under no duty to warn plaintiff not to use it.

[4, 5] It is obvious from the foregoing abstract of the instructions given that the court assumed that plaintiff had a right to be on the truss from which he fell and that defendant owed him the duty of ordinary care. It referred to the fact that defendant owed plaintiff the duty of ordinary care, that defendant was required to exercise such care for plaintiff's safety as would not amount to a violation of custom. Defendant offered two instructions which would have given the jury the question of whether plaintiff had a right to be on the truss, namely, the question of whether he was a trespasser. One of these instructions stated that if there was no agreement, contract or understanding between defendant and plaintiff's employer relative to their respective employees, then defendant owed plaintiff only the duty of care for his safety which defendant would have owed a stranger. The second instruction defined "stranger" as either a "trespasser or at best a bare licensee." It then stated that a "stranger" cannot be an "invitee." These instructions should have been given, as nowhere did the court give the jury the opportunity to decide whether plaintiff was a trespasser. One instruction stated that if plaintiff's employer were not to install the electrical work until after the steel had been erected defendant "was not under any obligation to plaintiff to depart from the normal, customary and usual methods of steel erection * * *" This, in effect, was an instruction that even if the electrical work was not to be installed until the erection of the steel work (in which event the electrical workers would have no right on the steel work) nevertheless defendant owed plaintiff the duty of not departing from the normal, customary and usual methods of steel erection. This is incorrect. In such event, unless defendant knew or had reason to know that plaintiff would go on the steel work, the only duty owed plaintiff by defendant would be that of refraining from causing him wilful and wanton injury. The nearest the court came to giving the jury the chance to decide if plaintiff, under the evidence, had a right to be where he was,

was in the instruction that if the defendant neither knew nor had reason to know that plaintiff would use the sag rod, defendant was under no duty to warn him not to use it. This was not sufficient to instruct that the jury must first determine that plaintiff must be more than a trespasser before any duty at all, either to install the sag rod in a rigid position or to warn, would arise.

[6-17] The court did not define the terms "invitee" (which the plaintiff claims he was) or "bare licensee" or "trespasser" (which defendant claims he was). There is considerable confusion in the authorities, especially in California, as to the difference in liability of an invitor to an invitee, from that of a licensor towards a licensee or an owner to a trespasser. Volume I, Witkin, Summary of California Law, Sixth Edition, defines a licensee as follows—"A licensee comes on the land by consent or permission, but usually for purposes of his own, having no relation to the business of the owner or occupant" (p. 741, § 207), and an invitee, thus—"An invitee enters at the 'express or implied invitation' of the occupant, for a purpose 'of common interest or mutual benefit' to the owner or occupant and himself, or in connection with the business of the occupant." (P. 742, § 210.) As to the duty of the licensor to the licensee—"Many California cases state that the duty is practically no greater than that owed to a trespasser; i. e. the licensee assumes the risks incident to the *condition of the premises,* and can recover only for 'wilful or wanton injury'" (p. 741, § 208; emphasis)—but then goes on to say that "where the presence of the licensee *is or should reasonably be known,* there is a duty to carry on *activities* with reasonable care." (P. 741, § 209.) There is some attempt made in this latter event to distinguish between active and passive negligence (see p. 742). The duty owed an invitee or business visitor, says Witkin, "is to exercise *ordinary care* to keep the premises in a *reasonably safe* condition." (P. 744, § 213.) The Restatement, Torts, does not make exactly the same categories as does Witkin and the California cases. It defines a licensee (p. 893, § 330) as "a person who is privileged to enter or remain upon land by virtue of the possessor's consent, whether given by invitation or permission" and breaks down licensees into two classifications: (1) gratuitous licensee, which it defines (p. 896, § 331) as "any licensee other than a business visitor as defined in § 332" and (2) business visitor, which it defines (p. 897, § 332) as "a person who is invited or permitted to enter or remain on land in the possession of another for a purpose directly or indirectly connected with business dealings between them." It also defines the liability somewhat differently. It states (p. 929, § 341): "A possessor of land is subject to liability to licensees, whether business visitors or gratuitous licensees, for bodily harm caused to them by his failure to carry on his activities with reasonable care for their safety, unless the licensees know or from facts known to them, should know of the possessor's activities and of the risk involved therein." Again it states (p. 932, § 342): "A possessor of land is subject to liability for bodily harm caused to gratuitous licensees by a natural or artificial condition thereon if, but only if, he (a) knows of the condition and realizes that it involves an unreasonable risk to them and has reason to believe that they will not discover the condition or realize the risk, and (b) invites or permits them to enter or remain upon the land, without exercising reasonable care (i) to make the condition reasonably safe, or (ii) to warn them of the condition and the risk involved therein." There is some difference in the liabilities imposed in California as compared to those set forth in the Restatement. California refers to the duty of a licensor to a licensee merely to refrain from wilful or wanton injury, as to the *condition* of the licensor's premises. The Restatement has no such limited rule. California does require the same degree of care as the Restatement as to activities carried on by the owner where the presence of the licensee is or reasonably should be known to the licensor, namely, ordinary care. The main difference between the duty owed a licensee and that owed the person referred to in California

as an invitee, and in the Restatement as a business visitor, is that in addition to using ordinary care not to harm the invitee or business visitor the landowner must use reasonable care to discover conditions which might cause such harm. Both Witkin and the Restatement agree on the definition of trespasser as one who enters or remains on land without privilege or consent and that the duty owed a trespasser by the owner is merely to refrain from wilful or wanton injury to him. However, if the landowner knows or should know that a trespasser has come on the land, he has a duty to warn him of concealed dangers and to exercise reasonable care in carrying on activities. In Newman v. Fox West Coast Theatres, 86 Cal.App.2d 428, at page 431, 194 P.2d 706, at page 707, the court summarized the rule as to licensees as follows: "While a number of California decisions have held that the duty owed by the owner or occupant of premises to a licensee is not much greater than that owed to a trespasser, to wit, that the licensee assumes the risks incident to the condition of the premises, and can recover only for 'willful or wanton injury' [citing cases] in Oettinger v. Stewart, 24 Cal.2d 133, [138], 139, 148 P.2d 19, 22, 156 A.L.R. 1221, it was announced that such cases were disapproved, and the court held 'that in cases involving injury resulting from active conduct, as distinguished from condition of the premises, the landowner or possessor may be liable for failure to exercise ordinary care toward a licensee whose presence on the land is known or should reasonably be known to the owner or possessor. * * *' Thus where the presence of a licensee is or should be known there is a duty to carry on activities with reasonable care. In thus holding the Supreme Court revived the rule enunciated as early as 1913 in Lucas v. Walker, 22 Cal.App. 296, 301, 134 P. 374, 377, 379, where it was decided that a licensee may recover for 'active negligence' or 'any overt act of negligence' as distinguished from a 'passive negligence.' That rule has been approved in a number of subsequent decisions [citing cases]. * * *"

[18-21] One of the questions the jury should have been called upon to determine, was whether plaintiff was on the truss with the permission, express or implied or the toleration of defendant. If he was, then the rule as set forth in Perry v. D. J. & T. Sullivan, Inc., 219 Cal. 384, 26 P.2d 485, would apply. There, in referring to a like situation where the employee of one independent contractor was injured by the negligence of another contractor, the court said 219 Cal. at page 389, 26 P.2d 485, at page 487, "There is no dispute as to the status of the employers of the respondent, and the appellant Smith respectively while on the premises of the owner. Each was there under contract to perform separate and distinct work on the building, independent of each other. As to the owner, they were each invitees, and as to each other they were strangers between whom there was no privity of contract. As such contractors, they owed to the employees of each other the same duty of exercising ordinary care for their safety during the progress of the work as they owed to the public generally. Sections 1708, 1714 and 3281, Civ.Code; 8 Thompson on Negligence, § 685; Hall v. Barber Door Co., 218 Cal. 412, 23 P.2d 279. The duty of care in the instant case was not only to refrain from the infliction of willful or wanton injury, but to exercise ordinary care for the safety of the employees of the other contractor on the building." And as we said in Biondini v. Amship Corp., 81 Cal. App.2d 751, 760, 185 P.2d 94, 99: "A person may be an invitee as to one portion of the premises and a mere licensee or even a trespasser as to others, but the question as to the extent of the invitation is usually one for the jury and not for the court. * * * 'The question as to whether the invitation, express or implied, included that part of the premises where the injury occurred is generally not one of law. On the contrary, it is usually a question of fact for the determination of the court or jury. (Citing cases.) * * *'"

[22] If a plaintiff goes beyond the scope of his invitation from the owner, and is not invited to the location by the

contractor there in charge, he loses (1) his status as invitee of the owner, and (2) his *equal footing* with the other contractor. Thus, in Scott v. George A. Fuller Co., 41 Cal.App.2d 501, 107 P.2d 55, a judgment notwithstanding the verdict was affirmed against a plaintiff who had used a portion of the premises he had not been invited to use. Plaintiff was a painter, employed by a subcontractor, and was injured when he used as scaffolding a joist set up by the general contractor as part of a form for the purpose of pouring concrete. The suit was against the general contractor. The appellate court found no evidence of express permission and no possible inference of implied invitation, and therefore affirmed the judgment in favor of defendant: "The most favorable inferences which may be drawn from the evidence lead to the conclusion that appellant was a mere licensee with respect to the use of the concrete forms as scaffolds. The record negatives any inference from which it could be concluded that appellant was invited to use the forms for this purpose." 41 Cal.App. at page 505, 107 P.2d at page 57.

[23, 24] The key question is as to plaintiff's status as against the defendant at the particular time and place of the accident. As we pointed out before, there is evidence from which a jury could find that plaintiff was an invitee of defendant or a licensee or trespasser with knowledge. However, it is not such evidence as to compel such a finding as a matter of law. Under the evidence, the jury could have found in accord with the superintendent's testimony that the electricians were not entitled to go on or use uncompleted steel work. The court should have given the instructions offered on this subject so that the jury, rather than the court, could have determined whether plaintiff was a trespasser whom defendant did not know or have reason to know might use the truss. See State Compensation Ins. Fund v. Allen, 104 Cal.App. 400, 285 P. 1053.

The judgment is reversed.

PETERS, P. J., and WARD, J., concur.

34 Cal.2d 649

PEOPLE v. UNIVERSAL FILM EXCHANGES, Inc.

Sac. 5959.

Supreme Court of California, in Bank.

Jan. 20, 1950.

Action by People of the State of California against Universal Film Exchanges, Inc., a corporation, to recover a use tax.

The Superior Court, Sacramento County, Peter J. Shields, J., entered judgment for the State, and defendant appealed.

The Supreme Court, Spence, J., held that failure to fill in blank of use tax portion of defendant's sales and use tax return was not a noncompliance with requirements of law in filling out consolidated return on form furnished taxpayer for that purpose where a return so completed had been treated by State Board of Equalization for many years as referrable to both sales and use tax computations, that filing of return started running of state of limitations as to both taxes, and State's action was barred.

Judgment reversed.

Prior opinion, see 204 P.2d 401.

1. Licenses ⚷30

A consolidated tax return consisting of two parts entitled "computation of resale sales tax" and "computation of use tax" is consistent with supplementary nature of two taxes as a comprehensive taxing program applicable to sale, use, storage, or consumption of personalty, each mutually exclusive, one taxing privileges not taxed by other and operating in conjunction with each other.

2. Licenses ⚷30
Statutes ⚷219

Similar language of Sales and Use Tax Act was open to construction by State Board of Equalization, and long-continued interpretation of law by officials called upon to administer it, with no ill results and no exception to such interpretation by legislature, was a strong factor tending to uphold that interpretation, and Board's failure to challenge successive returns of taxpayer leaving blank those portions of return referring to use tax as constituting his use tax return, would not be permitted to stand in way of correct administration of law. St. 1935, p. 1297; Revenue and Taxation Code, § 6487.

3. Licenses ⚷30

Where taxpayer left a total line blank in summation of prior blank lines on sales and use tax return under part entitled "computation of use tax", reasonable construction was that blanks represented a zero entry and were such a positive representation that there were no taxable transactions to return, that statute of limitations ran against state from date of filing return and barred recovery by state of use taxes due for year in which return was filed. St. 1935, p. 1297; Revenue and Taxation Code, § 6487.

4. Licenses ⚷30

Meticulous accuracy, perfect completeness or absence of any omission is not required to effectuate running of statute of limitations against a tax return, if return evinces an honest and genuine endeavor to satisfy the law.

5. Limitation of actions ⚷5(1)

Statutes of limitations are to be reviewed favorably as affording repose and security from stale demands to parties who may, by lapse of time, have lost ability to procure evidence.

6. Licenses ⚷30

Where tax return consisted of two parts entitled "computation of retail sales tax" and "computation of use tax", and taxpayer proceeded in good faith furnishing no information that was misleading and calculated to prevent discovery of material facts essential to making of assessments, but left use tax part of return completely blank, prior interpretation by State Board of Equalization that leaving of blanks on combined return showed a negation of presence of transactions subject to tax imposed thereunder, and as constituting filing of both a sales and use tax return, applied, and where state failed to bring action within three years, recovery of use tax by state was barred. St. 1935, p. 1297; Revenue and Taxation Code, § 6487.

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John W. Preston, Los Angeles, Athearn, Chandler & Farmer, Hoffman & Angell, F. G. Athearn, Leigh Athearn, Brobeck, Phleger & Harrison, Theodore R. Meyer, Robert H. Walker and Hart H. Spiegel, San Francisco, amici curiae on behalf of appellant.

Fred N. Howser, Attorney General, James E. Sabine and Irving H. Perluss, Deputy Attorneys General, for respondent.

SPENCE, Justice.

This action was instituted by the state to recover the use tax allegedly due and owing from the defendant under the Use Tax Act of 1935, Stats.1935, ch. 361, p. 1297, Deering's Gen. Laws, Act 8495a, 1935 Supplement, p. 2018, for the period from July 1, 1935, to March 31, 1937. The case was tried upon a stipulation of facts, which presented the question of whether the statute of limitations contained in section 15 of the act, now Rev. & Tax. Code, sec. 6487, was effective in bar of this action. The trial court adjudicated this issue contrary to defendant's claim, and from the adverse judgment thereupon entered defendant has appealed.

As in the trial court, the sole question submitted here for determination is the sufficiency of appellant's regularly filed quarterly tax returns to start the statute of limitations running against a use tax sufficiency assessment. Appellant maintains that its respective tax returns satisfied the law as a report of its use tax liability for the period in question. An analysis of the returns sustains appellant's position.

From the record it appears that appellant, Universal Film Exchanges, Inc., is a foreign corporation engaged in business in the state of California; that on March 20, 1946, a use tax determination was made by the State Board of Equalization (hereinafter referred to as the board) with respect to the use or storage of prints of motion pictures, certain office supplies and film equipment during the period from July 1, 1935, to March 31, 1937; that following the board's denial of a petition for redetermination of said tax liability on August 1, 1947, the alleged deficiency assessment became final, and this action was commenced; and that during the entire period involved, appellant had filed quarterly returns upon a form prescribed by the board for a combined showing of sales and use tax liability as follows:

SALES AND USE TAX RETURN

Computation of Retail Sales Tax

	For Retailers Use	For Board Use Only
1. Total sales (as defined in Sec. 2, Retail Sales Tax Act)	$	
2. Add—Cost of tangible personal property purchased for resale and subsequently used or consumed rather than resold		
3. Total (Item 1 plus Item 2)		
4. Less—Allowable deductions (as per details on back hereof)		
5. Taxable sales (Item 3 less Item 4) subject to Retail Sales Tax Act		
6. Retail Sales Tax due and payable (3% of amount shown in Item 5)		

Computation of Use Tax

7. Total sales price of tangible personal property sold for storage, use or other consumption in California and exempt from the Retail Sales Tax as sales in interstate commerce or sales made outside this State $

8. Add—Sales price of tangible personal property purchased outside of California or in interstate commerce for storage, use or other consumption in this State by you on which seller has not collected use tax from you

9. Total (Item 7 plus Item 8)

10. Amount of use tax required to be collected (3% of amount shown in Item 9)

11. Total amount of tax due and payable (Item 6 plus Item 10)

CERTIFICATE

I HEREBY CERTIFY, That I have examined this report and that the statements made and the figures shown herein and in any accompanying schedules are to the best of my knowledge and belief a true and complete return, made in good faith for the period stated, pursuant to the Retail Sales Tax Act of 1933 and the Use Tax Act of 1935.

Penalty

Interest

Total

Name of business or taxpayer

Agent, or officer if corporation, trustee, etc.

Title

The instructions which accompanied the returns in question contained in each case a specific direction corresponding to each numbered item on the return, but there was no general statement to the taxpayer to complete all blanks or to make entries on each line. Appellant's respective returns showed—under the sales tax subheading—entries as to items 1, 3, 4, 5 and 6 but a blank as to item 2; under the use tax subheading—blanks as to items 7, 8, 9 and 10; and finally an entry as to item 11, the same figure as was entered for item 6 there appearing as a total amount due for both the sales tax and use tax.

It further appears from the stipulation of facts that from July 1, 1935, to October 20, 1943, it was the practice of the section of the board which audited sales and use tax returns to treat the filing of such a return as a return of both sales and use tax; that during such period the board issued no notice of determination that such a return as appellant filed was not a sales and use tax return within the meaning of the applicable statute (Use Tax Act, sec. 7) for the reason that items 7 to 10, or any of them, were left blank; but that after an opinion of the attorney general dated October 21, 1943, which stated that the filing of a return on which there was no entry of information under the subheading "Computation of Use Tax" was "insufficient" as a report of use tax liability "to start the running of the statute of limitations", 2 Attorney General's Opinions 335, 336, the practice of the board was changed, and a return completed in the manner followed by appellant was considered as one limited solely to a sales tax report. Thereafter a notation which indicated either "none" or "zero" in response to the use tax items was a sufficient marking of that phase of the return within the administrative practice of the board. The parties further stipulated that the returns were filed by appellant in good faith, with no intent to avoid payment of either sales or use tax.

[1] At the time appellant's returns were filed, section 7 of the Use Tax Act of 1935 required "every retailer maintaining a place of business in this State" to "file with the board" a quarterly return "in such form as may be prescribed by the board" showing the transactions subject to the use tax for the reported period; and section 15 of the act provided that "Except in the case of a fraudulent return, or neglect or refusal to make a return, every notice of a determination of an additional amount due shall be mailed within three years after the return was filed." Sections 9 and 21, respectively, of the Sales Tax Act of 1933, St.1933, pp. 2602, 2606, provided similarly with regard to a return in report of transactions subject to the sales tax. Here more than nine years elapsed after the filing of appellant's returns before the board determined that a use tax was due from appellant for the period in question. The additional assessment, including interest of approximately sixty per cent, was then made against appellant upon the theory that it had made no use tax return during the designated period and hence, within the exception of section 15 of the Use Tax Act above quoted, the statute of limitations was tolled. But a reasonable interpretation of the form of appellant's returns does not sustain such theory.

Pursuant to its statutory authority, the board prescribed a single form denominated, according to its combined purpose, a "Sales and Use Tax Return," with the items numbered consecutively irrespective of the particular tax involved, and a concluding certificate stating the report to be "a true and complete return" pursuant to the Sales and Use Tax Acts. Appellant did not strike out the latter tax reference in completing the form furnished by the board for report of *both* tax liabilities. In making entries on the sales tax portion of the form, appellant left blank item 2 but filled in figures for the other items, including item 6 as a total therefor. Then leaving blank items 7, 8, 9 and 10 of the use tax portion, appellant filled in item 11 as a "total amount of tax due" the same figure appearing in item 6. Since item 11 was unequivocally stated to be "item 6 plus item 10," the entry for item 11 identical in amount with item 6 would mean that item 10 was necessarily zero, and inasmuch as item 10 represented a total of items 7, 8 and 9 of the use tax division, these too must have been zero. In other words, appellant asserted a negative for items 7, 8, 9 and 10, that it had no transactions which it considered subject to computation for use tax purposes, and that its total tax liability for *both* taxes was the same as the sales tax figure.

[2, 3] The consolidated form of tax return was consistent with the supplementary nature of the two taxes as a comprehensive taxing program applicable to the sale, use, storage, or consumption of personal property, each mutually exclusive in taxing privileges not taxed by the other but operating in conjunction one with the other. Douglas Aircraft Co., Inc., v. Johnson, 13 Cal.2d 545, 549, 90 P.2d 572; 24 Cal.Law Rev. 175, 176–177. While the prescribed single form for return of the complementary taxes called for a separate computation of the two taxes, it allowed for their combined report upon completion of item 11 as a total figure for the correlated assessments. Accordingly, the board during the period in question and for several years thereafter treated a return such as that filed by appellant, as a report on *both* sales and use tax liabilities. The legislature presumably knew of this administrative procedure by the board and yet during such time in the course of amending the Sales and Use Tax Acts, it made no change in those statutes which would restrict the board's power to prescribe the single form of return as a consolidated report of the two taxes. The leaving of blanks on the combined return was regarded by the board as a showing in negation of the presence of transactions subject to the respective taxes, and it issued no rules or regulations to the contrary. The similar language of

the two taxing statutes was open to construction by the board, and "the long-continued interpretation of the law by the officials called upon to administer it, with no ill results and no exception to such interpretation by the legislature, would be a strong factor tending to uphold [that] interpretation." Colonial Mut. Compensation Ins. Co., Ltd., v. Mitchell, 140 Cal. App. 651, 657, 36 P.2d 127, 129. The failure of the board to challenge appellant's successive returns appears not to have been the result of negligence in its duty to enforce the statutes involved—a failure to act which "should not be permitted to stand in the way of the correct administration of the law", 2 Sutherland, Statutory Construction, 3rd Ed., Horack, sec. 5106, p. 520; see In re Estate of Madison, 26 Cal.2d 453, 463, 159 P.2d 630—but rather, the result of carefully considered interpretation as the sustaining premise of a long-standing administrative practice. Coca-Cola Co. v. State Board of Equalization, 25 Cal.2d 918, 922, 156 P.2d 1; Colonial Mut. Compensation Ins. Co., Ltd., v. Mitchell, supra, 140 Cal.App. 651, 657, 36 P.2d 127.

[4] It is a matter of common practice in many self-assessment tax forms for the taxpayer to leave a blank on the lines believed to be inapplicable to him unless the form specifically directs otherwise, and the existence of such practice strengthens appellant's claims as to the purport of the consolidated returns it filed during the period in question. Restatement of Contracts, sec. 71. Appellant's insertion of a "zero" or the word "none" as a notation on the use tax computation lines would have conveyed no more information to the board in auditing its returns than the blanks left as to those items indicating appellant's belief that it had no transaction subject for report there. In neither event would the negative response be equivocal or ambiguous as would be the case in an income tax return, for example, where a taxpayer's showing of no tax due might rest on the premise of insufficient income for tax purposes, or stem from offsets because of deductions or exemptions. But the consolidated sales and use tax return involved only simple additions as to taxable transactions so that a blank as to any of the consecutively numbered items would indicate no sum was to be added as to that particular. Accordingly, a total line left blank in summation of prior blank lines could reasonably be construed in no other way than as representing a "zero" entry, a positive representation that there were no taxable transactions to return. To this point are the decisions in bankruptcy cases on the question of whether the bankrupt should be denied a discharge, under section 14, sub. b of the Bankruptcy Act, as amended, 11 U.S.C.A., § 32, sub. c, because he had obtained credit on the basis of a "false statement in writing" with respect to his financial condition. Pertinent there were these factors: (1) blanks left opposite items in the listing of liabilities which should have contained a figure if truthfully answered by the bankrupt; (2) a total of the column listing of liabilities necessarily representing the amounts in the blanks to have been zero; and (3) the certification that the financial statement was "true and correct in every particular." In the light of these considerations, the federal courts have held the blanks to constitute a positive representation or declaration of nothing to report—there material on the issue of a false concealment of existing obligations and sufficient to prevent a discharge in bankruptcy. In re Smith, D.C., 232 F. 248; In re Glick, 7 Cir., 53 F.2d 951; In re Trimble, 8 Cir., 55 F.2d 165. So here, appellant's omissions in the use tax division of its combined return—though made in good faith as distinguished from the bankruptcy cases—appear as a positive assertion of "zero" liability for such tax consistent with the total figure given in summation of its taxable transactions on the consolidated return and the certification that such report was "a true and complete return" under both the Sales and Use Tax Acts.

[5] As so analyzed, such tax return as that filed by appellant should be deemed effective to start the statute of limitations running against its use tax liability. It was made on the form prescribed by the board as a final, consolidated return in the

self-assessment of sales and use taxes for the quarterly period covered, and it was completed as a total report relating to both tax liabilities according to appellant's certification as to its scope. Meticulous accuracy, perfect completeness or the absence of any omission is not required to effectuate the running of the statute of limitations against a return, if it evinces an honest and genuine endeavor to satisfy the law. Zellerbach Paper Co. v. Helvering, 293 U.S. 172, 180, 55 S.Ct. 127, 79 L.Ed. 264; Myles Salt Co. v. Comm. of Internal Revenue, 5 Cir., 49 F.2d 232, 233. Otherwise there would practically be no period of limitation whatever operative in bar of a deficiency assessment. Cf. United States v. Mabel Elevator Co., D. C., 17 F.2d 109, 110. There is a difference between a defective or incomplete return filed in good faith in an attempted compliance with the law and the filing of what in effect is "no return" at all for the purpose here in question. As illustrative of the latter situation, a return which fails to disclose information essential to the making of an assessment, John D. Alkire Inv. Co. v. Nicholas, 10 Cir., 114 F.2d 607, 609-610, or which purports to answer two tax liabilities without the filing of the additional separate return required by the governing statute and regulations, Comm. of Internal Revenue v. Lane-Wells Co., 321 U.S. 219, 222-223, 64 S.Ct. 511, 88 L.Ed. 684; Rockland & Rockport Lime Corp. v. Ham, D. C., 38 F.2d 239, 240; McDonnell v. United States, 59 F.2d 295, 299-300, 75 Ct.Cl. 175; Comm. of Internal Revenue v. National Land & Construction Co., 6 Cir., 70 F.2d 349, 350-351, or which is a tentative report made as a condition of the granting of an extension of time, Florsheim Brothers Drygoods Co. v. United States, 280 U.S. 453, 459-460, 50 S.Ct. 215, 74 L.Ed. 542; National Contracting Co. v. Comm. of Internal Revenue, 8 Cir., 105 F.2d 488, 491, will not suffice to start the period of limitations running against an additional tax assessment. See 3 A.L.R.2d 647.

At this point attention must be directed to the case of Whitmore Oxygen Co. v. Utah State Tax Commission, Utah, 196 P.2d 976, holding that a combined sales and use tax form, completed in substantially the same manner as appellant here proceeded, constituted a return for the sales tax only and "was not sufficient to start the statute of limitations running against a use tax." 196 P.2d at page 982. As supporting authority, the decision relies on the cases of Comm. of Internal Revenue v. Lane-Wells Co., supra, 321 U.S. 219, 64 S.Ct. 511, 88 L.Ed. 684, and John D. Alkire Inv. Co. v. Nicholas, supra, 10 Cir., 114 F.2d 607, which, in our opinion, as above noted, rest on distinguishable factual considerations. In the Lane-Wells Co. case, the corporate taxpayer, having in good faith filed its income tax return and therein denied that it was a personal holding company subject to a surtax, unsuccessfully contended that "its regular corporation income tax return must be taken as an equivalent to the separate return * * * both for starting the period of limitation and for avoiding the penalty" for failure to file the additional form required by the Treasury Regulations for a personal holding company. 321 U.S. at page 222, 64 S.Ct. at page 513, 88 L.Ed. 684. The "taxpayer" was "under liabilities for two taxes and under an obligation to file two returns," and "one return addressed to but one of the liabilities" will not answer "the purpose of both." 321 U.S. at page 223, 64 S.Ct. at page 513. Nor did it matter that the income tax return might show all the facts necessary for the Commissioner to compute the taxpayer's liability as a personal holding company, for "the Treasury was fully within the statute in requiring that information in a *separate* return", emphasis added; 321 U.S. at page 223, 64 S.Ct. at page 513, and the "omission to file a prescribed return cannot be supplied by reference to a return filed for another purpose". See Hewitt v. Bates, 297 N.Y. 239, 78 N.E.2d 593, 596.

Likewise defective in furnishing the required tax information in the manner prescribed was the return filed in the John D. Alkire Inv. Co. case, supra, representing that the corporate taxpayer had no taxable income for the years in question. While disposition had in fact been made of the income bearing property, it was not done "in the ordinary manner but was in trust with reservation of the power of revocation, in consequence of which the taxpayer was liable for the tax"—which "significant and decisive feature of the conveyance in respect to the taxpayer's liability", the return not only failed to mention, but its affirmative notations "considered together, strongly suggested that the conveyance had been made in the usual manner, not in trust with the power of revocation reserved." As so analyzed, such return—although "there was no intentional fraud, wilful negligence or purposed attempt at evasion of tax on the part of the taxpayer"—"not only failed to disclose requisite information" but was "misleading and calculated to prevent discovery of material facts," and accordingly it was "not effective to start the period of limitation running" against a deficiency assessment. 114 F.2d at page 610.

But here, appellant was under obligation to file only a single return addressed to its sales and use tax liabilities for the quarterly period covered—not *two* returns in report of unrelated taxes, cf. Comm. of Internal Revenue v. Lane-Wells Co., supra, 321 U.S. 219, 223, 64 S.Ct. 511, 88 L. Ed. 684—and proceeding in good faith, appellant furnished no information that was "misleading and calculated to prevent discovery of material facts" essential to the making of assessments. Cf. John D. Alkire Inv. Co. v. Nicholas, supra, 114 F. 2d 607, 610. The important features in this case appear to stem from the following considerations: the prescribed form entitled as a return for the two complementary taxes; the consecutively numbered tax items listed for separate computation but consolidated for summation in the required total self-assessment procedure; and the concluding certification that the return was completed in reference to both sales and use tax obligations. Pursuant to the instructions accompanying the prescribed form, appellant made entries thereon only as to the transactions which it believed subject to tax, that is, in the sales tax portion; and the blanks in the use tax portion, as included in the final addition for the total tax assessment, represented, as clearly as the notation of a "zero" or the writing of the word "none," appellant's disclaimer of any liability in those particulars. In short, there was no failure here on the part of appellant to comply with the requirements of the law in filling out its consolidated return on the form furnished it for that purpose, and a return so completed was accordingly treated by the board for many years, including the time in question, as referable to both sales and use tax computations. It does not appear in the contrarily decided Utah case above noted, Whitmore Oxygen Co. v. Utah State Tax Commission, Utah, 196 P. 2d 976, that such administrative practice there prevailed. As the problem here presents itself, the rationale of the dissent rather than that of the majority opinion in the Utah case constitutes, in our judgment, the better-considered view as to the sufficiency of such return as that filed by appellant to start the running of the statute of limitations as to *both* tax reports.

[6] "[S]tatutes of limitations are to be viewed favorably as affording to parties who may, by the lapse of time, have lost the ability to procure evidence, repose and security from stale demands." Lilly-Brackett Co. v. Sonnemann, 157 Cal. 192, 197, 106 P. 715, 717, 21 Ann.Cas. 1279; see, also, Denke v. Bowes, 77 Cal.App.2d 642, 645, 176 P.2d 81. Long before the enactment of the Use Tax Act, section 338, subdivision 1, of the Code of Civil Procedure provided that "An action upon a liability created by statute, other than a penalty or forfeiture" shall be connected within three years, and that section has been held to apply to actions for the collection of delinquent taxes. County of Los Angeles v. Ballerino, 99 Cal. 593, 595, 32 P. 581, 34 P. 329; City of San Diego v. Higgins, 115 Cal. 170, 175, 46 P. 923; Chambers v. Gallagher, 177 Cal. 704, 708, 171 P. 931. Then in 1935, the legislature, in adopting the Use Tax Act, provided the same limitation for bringing an action thereunder to recover a delinquent tax (now Rev. & Tax. Code, sec. 6711), in recognition of the right of the taxpayer, "except in the case of a fraudulent return, or neglect or refusal to make a return", Use

Tax Act, sec. 15, supra, now Rev. & Tax. Code, sec. 6487, to rely on the statutory time limit as an appropriate defense. Such policy, "vital to the welfare of society and [so] favored by the law", Denke v. Bowes, supra, 77 Cal.App.2d at page 645, 176 P.2d at page 83, stems from practical considerations, including the problem of assembling evidence in dispute of a long-delayed demand. Miller v. Ash, 156 Cal. 544, 563-564, 105 P. 600. Accordingly, appellant properly challenged the timeliness of the deficiency determination as to its use tax liability, here made more than nine years after it had filed its respective sales and use tax returns covering the period involved.

The judgment is reversed.

GIBSON, C. J., SHENK, EDMONDS, CARTER, and SCHAUER, JJ., and PETERS, J. pro tem., concur.

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34 Cal.2d 660

AMERICAN DISTILLING CO. v. CITY COUNCIL OF CITY OF SAUSALITO et al

S. F. 17785.

Supreme Court of California, in Bank.

Jan. 24, 1950.

Proceeding by the American Distilling Company, a corporation, for a writ of mandate to compel the council of the City of Sausalito and the members thereof to terminate proceedings for annexation of uninhabited territory to the city.

From a judgment and decree declaring the annexation ordinance to be void, ordering the council to rescind it and, granting the writ, in the Superior Court of Marin County, Edward I. Butler, J., the respondents appealed.

The Supreme Court, Shenk, J., held that the annexation proceedings were void, that the writ of mandamus was a proper remedy to compel the enforcement of the duty of the council and that quo warranto was not an adequate remedy.

Judgment modified and as modified affirmed.

Carter and Schauer, JJ., dissented.

For prior opinion see 202 P.2d 125.

1. Constitutional law 🔑70(1)

Generally under the doctrine of separation of powers the courts will not interfere with the legislative process. Civ.Code, § 3423, subd. 7; Code Civ.Proc. § 526, subd. 7.

2. Municipal corporations 🔑27

In proceeding for annexation of uninhabited territory to a city, the statute constituted the measure of power to be exercised by the city council. Gen.Laws, Act 5162, §§ 6, 7.

3. Mandamus 🔑78

A mandamus petition to compel city council to terminate proceeding for annexation of uninhabited territory to the city was maintainable as against contention that any judgment therein would operate as an unlawful interference with the exercise of legislative power of the city council where under the statute the council had only the power and duty to terminate the annexation proceedings in event of a specified protest. Gen.Laws, Act 5162, §§ 6, 7.

4. Municipal corporations 🔑33(9)

In proceeding for annexation of uninhabited territory to city under section of the act requiring city council to base a determination of sufficiency of protest on assessed valnue of properties according to the last equalized assessment, where proceedings to annex were commenced on October 24, 1947, the 1947 assessment roll was the roll to be considered. Gen.Laws, Act 5162, §§ 6, 7.

5. Municipal corporations 🔑33(9)

Where city council on October 24, 1947, commenced proceedings to annex uninhabited territory which included property of petitioner and property of the United States Government, city council in determining sufficiency of protest based on assessed value of properties could not impute a value to the government land according to the 1938 assessment roll showing land to be in private ownership and to be assessable and at the same time compute the 1947 assessed value of the private property solely on the land disregarding the improvements. Gen.Laws, Act 5162, §§ 6, 7.

6. Mandamus ⟹78
Municipal corporations ⟹33(9)

If protests to annexation of uninhabited territory to the city are filed by a sufficient number of owners according to the statutory measure, the city council is without authority to do anything except to sustain the protests and terminate the proceedings, and such duty could be directed to be performed by mandamus. Gen.Laws, Act 5162, §§ 6, 7; Code Civ.Proc. §§ 1085, 1086.

7. Mandamus ⟹172

In mandamus to compel city council to terminate annexation proceedings of uninhabited territory to the city, petitioner's right to relief was determinable by the facts as they existed at the time the petition was filed and unless in the meantime the law defining the legal duty has been changed the peremptory writ should follow the terms of the alternative writ. Gen. Laws, Act 5162, §§ 6, 7; Code Civ.Proc. §§ 1085, 1086.

8. Mandamus ⟹78
Municipal corporations ⟹33(8)
Quo warranto ⟹8

Quo warranto is an appropriate remedy where annexation proceedings by city have been completed and the city or district is exercising control over the territory but where proceedings have not been completed at the time the relief is sought, courts will entertain petitions in mandate or certiorari.

9. Mandamus ⟹3(10)

Mandamus would lie to compel city council to terminate annexation proceeding for incorporation of uninhabited territory to the city as against claim that petitioner had a plain, speedy and adequate remedy by quo warranto where proceedings were not completed at time relief was sought so that quo warranto would not afford an adequate remedy and where mandate appeared to be the only effective remedy available to the petitioner by which performance of the legal duty of the council could be procured. Gen.Laws, Act 5162, §§ 6, 7.

10. Mandamus ⟹23(1)

Mandamus to compel city council to terminate annexation proceeding seeking to incorporate uninhabited territory to the city was maintainable as disclosing a sufficient showing of beneficial interest and of damages ensuing if the writ were denied where it appeared that petitioner was the owner of the property proposed to be annexed illegally. Gen.Laws, Act 5162, §§ 6, 7.

11. Mandamus ⟹187(9)

In mandamus proceeding to compel city council to terminate annexation proceeding of uninhabited territory to the city, declaration of trial court that the ordinance was void and should be set aside was harmless since such result followed without the declaration and city council was bound to comply with the alternative writ unless it could show good cause for not doing so. Gen.Laws, Act 5162, §§ 6, 7.

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John B. Ehlen, San Francisco, for appellants.

Norman A. Eisner and Samuel W. Wicklow, San Francisco, for respondent.

SHENK, Justice.

The petitioner, American Distilling Co., commenced this mandamus proceeding in the Marin County superior court to compel the City Council of the City of Sausalito to terminate certain annexation proceedings. The appeal is from a judgment ordering a peremptory writ.

On October 24, 1947, pursuant to the Annexation of Uninhabited Territory Act of 1939, Stats.1939, p. 1567, Deering's General Laws, Act 5162, the city council by resolution commenced proceedings to annex uninhabited territory contiguous to the northern boundary of Sausalito. This territory includes the industrial property of the petitioner and the property of the United States Government known as Marinship. November 18, 1947, was fixed as the time when the owners of the real property proposed to be annexed could appear and protest. The petitioner filed a written protest, appeared at the hearing on November 18, 1947, and objected to further action on the part of the city council. At the final hearing on January 6, 1948, the United States Government filed a written protest. At all times the petitioner insisted upon the sufficiency of its own protest to require a determination that the city council was without power to approve the annexation.

Section 6 of the Annexation of Uninhabited Territory Act of 1939 provides:

"At any time not later than the hour set for hearing objections to the proposed annexation, any owner of property within the territory proposed to be annexed may file written protest against the proposed annexation. * * * At the time set for hearing protests the legislative body of such municipal corporation shall proceed to hear and pass upon all protests so made and if it be found that protest is made by the owner or owners of one-half of the value of the territory proposed to be annexed according to the last equalized assessment roll, no further proceedings shall be taken in connection with the proposed annexation."

Section 7 provides: "If it be found that protest is not made by the owner or owners last above mentioned, the legislative body of such municipal corporation must by ordinance approve or disapprove such annexation."

The petitioner's objection to further proceedings by the city council was based on the contention that the 1947 equalized assessment roll in Marin County was the last equalized assessment roll within the meaning of the statute; that the holdings of the petitioner and of the United States comprised the entire territory sought to be annexed; that the lands owned by the federal government were non-assessable and were assessed as of no value on the 1947 assessment roll, and therefore that the petitioner's protest was sufficient to prevent annexation.

The city council declined to make a finding that a written protest had been filed by the owner of one-half in value of the territory proposed to be annexed according to the 1947 equalized assessment roll or to terminate the proceedings. At the January 6th meeting a resolution was adopted rejecting the protest of the United States for the reason that it was not filed within time. The city council then determined that legal protest had not been presented by the owner of one-half in value of the territory proposed to be annexed according to the last equalized assessment roll, and the city attorney was instructed to prepare an ordinance approving the annexation. This ordinance was presented and held for final action on Tuesday, February 2nd.

The following took place all in 1948: The present proceeding was commenced on January 19th. An alternative writ was issued directing the city council to make a finding that a protest was duly made by the owner of one-half in value of the territory proposed to be annexed according to the last equalized assessment roll; to set aside any determination to the contrary, and to terminate the annexation proceedings or show cause on January 26th why it had not done so. The city council's demurrer was overruled and an answer was filed on February 27th. On March 5th the matter was set down for trial on March 22nd.

On the trial date the petitioner filed a supplemental petition seeking to set aside an ordinance adopted on March 16th by which the city council had approved the annexation on the supposition that a sufficient protest had not been presented. Counsel for the city moved to dismiss the mandamus proceeding on the ground that the annexation ordinance had been adopted and that the granting of relief would interfere with the performance of a legislative act. The motion was denied.

After a hearing on the merits the trial court found that the last equalized assessments roll as contemplated by section 6 of the Act was the 1947 assessment roll of Marin county; that that roll showed the real property of the petitioner to have been assessed at $137,585.00; that the real property of the United States was assessed at "0"; that the petitioner was the only owner of property in the territory which had assessable value and which was assessed at any amount, and that since the petitioner had duly protested in the annexation proceedings it was entitled to the relief sought.

The judgment declared the ordinance void, directed the issuance of a peremptory writ commanding the city council to make a finding in accordance with the undisputed facts, and to adopt a resolution setting aside the ordinance and the annexation proceedings.

[1] The city council raises the preliminary question of the power of the trial court to enter any judgment at all in this proceeding. The contention is that the judgment operated as an unlawful interference with the exercise of legislative power. Reliance is placed on the general rule, both statutory and decisional, that under the doctrine of separation of powers the courts will not interfere with the legislative process. Sec. 3423, subd. seventh, Civ.Code; Sec. 526, Subd. 7, Code Civ. Proc.; Johnston v. Board of Supervisors, 31 Cal.2d 66, 187 P.2d 686; Berkeley High School Dist. of Alameda County v. Coit, 7 Cal.2d 132, 59 P.2d 992; Nickerson v. San Bernardino County, 179 Cal. 518, 177 P. 465; Glide v. Superior Court, 147 Cal. 21, 81 P. 225. On the other hand the petitioner invokes certain recognized exceptions applicable to municipal and other inferior legislative bodies. See Spring Valley Water-Works v. City of San Francisco, 82 Cal. 286, 22 P. 910, 1046, 6 L.R.A. 756, 16 Am.St.Rep. 116; Inglin v. Hoppin, 156 Cal. 483, 105 P. 582; San Christina Inv. Co. v. City and County of San Francisco, 167 Cal. 762, 141 P. 384, 52 L.R.A.,N.S., 676; and see Berkeley High School Dist. of Alameda County v. Coit, supra, 7 Cal.2d at page 137, 59 P.2d 992. It is deemed unnecessary to consider this problem. The contention of the city council assumes that it had authority to exercise a legislative function under the statute and the facts of this case. The undisputed facts and the statutory provisions require a holding that the city council had only the power and duty to terminate the annexation proceedings.

[2, 3] It is not questioned that in the annexation proceedings the statute constituted the measure of the power to be exercised by the city council. Kleiber v. City and County of San Francisco, 18 Cal.2d 718, 724, 117 P.2d 657. As hereinabove noted the statute provided for a hearing by the city council to determine the sufficiency of the protests. Pursuant to section 6 if protest was duly made by the owner or owners of one-half of the value of the territory proposed to be annexed according to the last equalized assessment roll, the matter was at an end and the city council had no power or authority to do anything except to terminate the proceedings. If the protests were insufficient the city council was then authorized and required by section 7 to enact an ordinance either approving or disapproving the annexation.

The character of the action of the city council, called generally the legislative body, in a particular case depends on the nature of the act or duty and the provisions of the statute under which it is performed. Here the statute makes the distinction between non-legislative and legislative action by directing exercise of the latter function only when the protests are shown to be insufficient.

This court in other cases has recognized the division between the administrative or other non-legislative function preceding the performance of the legislative act where constitutional or statutory requirements were involved. McFadden v. Jordan, 32 Cal.2d 330, 196 P.2d 787; Gage v. Jordan, 23 Cal.2d 794, 147 P.2d 387; Epperson v. Jordan, 12 Cal.2d 61, 64, 82 P.2d 445, and cases cited.

The issue before the trial court in this mandamus proceeding was therefore whether the city council had exceeded its statutory authority in determining that the protests were insufficient. It is contended that the court's finding that the protests were sufficient is unsupported.

[4, 5] Section 6 of the Act required the city council to base a determination of the sufficiency of the protests on the assessed value of the properties according to the last equalized assessment roll, see Bryant v. Board of Supervisors, 32 Cal.App. 495, 504, 163 P. 341. The court correctly concluded that the 1947 assessment roll was the roll to be considered. The city council purported to ignore the plain wording of the statute and to impute a value to the gov-

ernment owned land according to the 1938 assessment roll which was the last roll showing this land in private ownership and to be assessable; and at the same time to compute the 1947 assessed value of the petitioner's property solely on the land, disregarding the improvements. It also received testimony of the 1947 fair market value of the government owned land. This market value was in excess of the assessed value of the petitioner's land and improvements.

[6, 7] As pointed out in Shepherd v. Board of Supervisors, 1934, 137 Cal.App. 421, at page 429, 30 P.2d 578, at page 582, also involving annexation proceedings, if it should appear that protests were filed by a sufficient number of owners according to the statutory measure, the board would be without authority to do anything except to sustain the protests and terminate the proceedings. The statute then in force, Stats. 1899, p. 37, repealed by Stats.1937, p. 557, designated the owners of one-half of the land sought to be annexed as the guide by which the sufficiency of the protests was to be determined. That case involved publicly-owned land which comprised more than one-half of the uninhabited land annexed. Thereafter the legislature repealed the act and adopted the present statute for the obvious purpose of affording to private property owners a means of making effective protest. As applied to the present case the new statute requires that protests filed by the owner or owners of one-half of the 1947 assessed value of the territory sought to be annexed should be the measure of sufficiency. Without dispute the property of the petitioner was the only property in the territory which had assessable value in that year.

The trial court's finding of sufficiency followed from the indisputable facts and required the conclusion that the city council had no discretion to do other than comply with the statute and terminate the annexation proceedings. The city council is a board which may appropriately be directed to perform this statutory duty. Sections 1085 and 1086 Code of Civil Procedure; IV Dillon, 5th Ed. p. 2689.

[8] The petitioner's right to relief is determinable by the facts as they existed at the time the petition was filed Rittersbacher v. Board of Supervisors, 220 Cal. 535, 536, 541, 32 P.2d 135; and unless in the meantime the law defining the legal duty has been changed, the peremptory writ should follow the terms of the alternative writ. Johnson v. Fontana County Fire Protection Dist., 15 Cal.2d 380, 391–392, 101 P.2d 1092; Barry v. Board of Directors, 7 Cal.App.2d 412, 429, 46 P.2d 298. No such change is here involved.

The city council urges that the trial court should have exercised its discretionary power to deny the peremptory writ because, it is claimed, the petitioner had a plain, speedy and adequate remedy in the ordinary course of law. The proceeding in quo warranto is referred to as the procedure by which the legality of annexation proceedings may be brought into question.

[9] Quo warranto has been invoked or designated as the appropriate remedy in cases where annexation proceedings have been completed and the municipal corporation or district is exercising control over the territory. People v. Town of Ontario, 148 Cal. 625, 84 P. 205. People ex rel. Peck v. City of Los Angeles, 154 Cal. 220, 97 P. 311; Keech v. Joplin, 157 Cal. 1, 14, 106 P. 222; Coe v. City of Los Angeles, 42 Cal. App. 479, 183 P. 822; People v. City of Los Angeles, 93 Cal.App. 532, 535, 269 P. 934; Crowl v. Board of Trustees, 109 Cal.App. 214, 292 P. 985; City of Burlingame v. County of San Mateo, 90 Cal.App.2d 705, 203 P.2d 807. But where the annexation proceedings were not completed at the time relief was sought the courts have entertained petitions in mandate or certiorari. Miller & Lux v. Board of Supervisors, 189 Cal. 254, 208 P. 304; Shepherd v. Board of Supervisors, 137 Cal.App. 421, 30 P.2d 578; Capuchino Land Co. v. Board of Trustees, 34 Cal.App. 239, 167 P. 178. It is thus apparent that when the remedy by quo warranto has not matured it is not deemed plain, speedy and adequate for the purpose of controlling the performance of a statutory duty. And since mandate appeared to be the only effective remedy available to

the petitioner by which performance of the legal duty could be procured, the trial court did not abuse its discretion in granting the writ.

[10] A sufficient showing of beneficial interest and of damages which might ensue if the writ were denied was disclosed when it appeared that the petitioner was the owner of the property proposed to be annexed illegally. See Frederick v. City of San Luis Obispo, 118 Cal. 391, 50 P. 661; Santa Rosa Lighting Co. v. Woodward, 119 Cal. 30, 34, 50 P. 1025.

[11] The objection to the declaration of the trial court that the ordinance is void and should be set aside presents a matter of no particular consequence in view of the record. That result follows without the declaration. The city council was bound to comply with the requirements of the alternative writ unless it could show good cause for not doing so. This it did not do. Any objection to the judgment on this ground may be removed by a modification.

Accordingly the judgment is modified by striking therefrom the provision commanding the defendant to set aside the ordinance. As so modified the judgment is affirmed.

GIBSON, C. J., and EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

In my opinion the judgment should be affirmed without modification. The ordinance adopted on March 16, 1948 was unquestionably void. The majority opinion, in effect, so holds. Then why should not the trial court have so declared and by its judgment direct that it be vacated and set aside? Certainly a void ordinance is not immune from judicial review, and where such an ordinance is adopted in direct defiance of an order of the Superior Court, that court should have the power to direct that it be set aside and vacated. It seems hypertechnical to me to say that a court may declare that a legislative body has no power or authority to adopt an ordinance, and yet may not declare such ordinance void and direct that it be set aside. By what legerdemain is such a conclusion reached? Here we have an ordinance based not only upon a finding contrary to the undisputed facts before the Council, but one adopted in direct violation of an order of the trial court. It is plainly obvious that since the City Council had no authority under the statute but to find in accord with the undisputed fact that petitioner's protest was sufficient, there could be no possible legal basis for the adoption of the annexation ordinance, and certainly no ill result can follow from the mandate of the court that it be set aside. I can not, therefore, see any basis whatsoever for the holding of this Court that the "judgment is modified by striking therefrom the provision commanding the defendant to set aside the ordinance".

The majority opinion is written apparently with the thought in mind of avoiding the legal proposition involved in Santa Clara County v. Superior Court, 33 Cal.2d 552, 203 P.2d 1, as this case is not cited. While factually the cases are different, the same basic legal theory is applicable to both cases, and if the rule of the Santa Clara County case were applied to the case at bar the judgment here would have to be reversed. The Santa Clara County case held that the court had no jurisdiction to interfere with the legislative process, except to prevent incurring of expense by the legislative body for an unlawful purpose, until such legislative process was completed, and then quo warranto was the only remedy. Mr. Justice Schauer and I dissented in that case, and it is obvious that the majority have now departed from the holding in that case without even mentioning it.

In my opinion the judgment in the case at bar is eminently sound and should be affirmed.

SCHAUER, J., concurs.

34 Cal.2d 669

PEOPLE v. HUIZENGA.

Cr. 5035.

Supreme Court of California, in Bank.
Jan. 26, 1950.

Edward Albert Huizenga was convicted in Superior Court, Sacramento County, Raymond T. Coughlin, J., of first-degree murder, and he appealed.

The Supreme Court, Traynor, J., held inter alia, that evidence was sufficient to justify the conviction.

Judgment affirmed.

1. Criminal law 🔑1159(6)

If circumstances reasonably justify verdict of jury, opinion of reviewing court that those circumstances might also reasonably be reconciled with innocence of defendant will not warrant interference with jury's determination.

2. Criminal law 🔑552(3)

The rule that circumstances relied upon by prosecution must be consistent with guilt and inconsistent with hypothesis of innocence is a rule of instruction for jury, and is not a rule for guidance of court on review.

3. Criminal law 🔑741(1), 742(1), 745

The functions of jury include determination of credibility of witnesses, weighing of evidence and drawing of justifiable inferences of fact from proven facts.

4. Criminal law 🔑731

Trial judge must deny jury any opportunity to operate beyond its province, and jury may not be permitted to conjecture merely or to conclude on speculation or from passion, prejudice or sympathy.

5. Criminal law 🔑753(2)

If evidence is such that reasonable jurymen must necessarily have a reasonable doubt as to guilt, the judge must require acquittal.

6. Criminal law 🔑741(1)

If a reasonable mind might fairly have a reasonable doubt or might fairly not have one, as to guilt of accused, the case is for jury.

7. Criminal law 🔑731

The judges' function is exhausted when he determines that the evidence does or does not permit conclusion of guilt beyond reasonable doubt within fair operation of reasonable mind.

8. Homicide 🔑253(2)

Circumstantial evidence supported conviction of first-degree murder.

Elvin F. Sheehy, Public Defender, and Clarence H. Pease, Sacramento, for appellant.

Fred N. Howser, Attorney General, and Doris H. Maier, Deputy Attorney General, for respondent.

TRAYNOR, Justice.

Edward Albert Huizenga was convicted by a jury of first degree murder and has been sentenced to death. On this appeal from the judgment under Penal Code section 1239(b), the sole issue is whether the evidence is sufficient to justify the conviction.

On January 18, 1949, the body of a male person was taken from the American River east of the Jibboom Street bridge in Sacramento County. The body was headless, clothed only in a suit of underwear, with the legs tied together at the ankles with a piece of sash cord. Fingerprint records established the identity of the body as that of Arthur Paulson. On January 24th, the decapitated head was found, and the identity of the body confirmed. The county autopsy surgeon, Dr. Wallace, performed autopsies on the torso and head. On the right side of the head there were multiple small fractures of the bones radiating in several directions. One piece of the temporal bone about an inch long had been driven into the brain, presumably by a dull object. Dr. Wallace testified that death had been caused by laceration of the brain, subdural hemorrage, and the multiple fractures of the skull.

On January 20th defendant was found living in a tarpaper shack that had been owned and occupied by the decedent. Defendant stated, in answer to questions before trial and while testifying on his own behalf, that he had known Arthur Paulson since September, 1948, when they met while picking tomatoes. They camped together east of the Jibboom Street bridge until about the first of November. At that time, they separated and went to different parts of the state where harvesting was in progress. Defendant said that he returned to Sacramento County about December 15th. He pitched camp in the same area that Paulson and he had occupied during September. The morning of December 17th defendant met Paulson, who invited him to move to the shack that Paulson had constructed from tarpaper and wooden poles. Defendant did not stay with Paulson that night but moved in with him the following day, December 18th. Paulson slept on a bunk, and defendant slept on boxing board laid on the dirt floor.

Defendant testified that Paulson went into Sacramento on December 21st to obtain a lamp for his shack. This testimony was corroborated by the witness Doucet, a neighbor in the camp area, who met Paulson in Sacramento about noon. Paulson was on his way back to the cabin with the lamp. He was in good humor and did not speak of leaving the vicinity. There is no evidence that he was seen alive thereafter except by defendant.

Defendant testified further that when he returned to the shack early in the afternoon, after trying unsuccessfully to find work, Paulson was already there cooking. He looked upset and acted queerly. When defendant inquired what was wrong, Paulson told him that "on the way home he had been strong-armed and robbed of $50.00". Paulson told defendant that he would not be in Sacramento the next day, that he was going to Ventura for work. That night defendant and Paulson read the newspapers and retired around 8 or 9 o'clock.

Early the following morning, December 22nd, defendant awoke when Paulson was building a fire. Paulson made up his bedroll containing his blankets, a suit of underwear, and cooking utensils and tied the roll with sash cord. Defendant asked Paulson if he was going to store his property. Paulson said he was going to take what he wanted and told defendant: "You can have what I leave." Paulson had certain items of property belonging to one William Allen that he told defendant to leave with Doucet if defendant left before Allen returned.

Later in the day defendant saw Doucet and told him that Paulson had been strong-armed the previous afternoon and that $50 had been taken from him. Defendant told Doucet that Paulson had gone to Ventura and that he took his bedroll and his clock, leaving everything else for defendant. Doucet visited defendant at the shack around 11 o'clock that morning. He observed that a suit of Paulson's underwear was on the line and that defendant was slicing bacon that had belonged to Paulson. Defendant said that Paulson had left all his food for defendant. Doucet observed defendant later constructing a latrine near Paulson's shack, about 100 feet from Doucet's.

On the same day defendant visited the cabin of Eugene Belanger in the same area. He had not previously spoken to Belanger. He told him substantially what he had told Doucet concerning Paulson's being robbed, becoming disgusted, and going to Ventura. The following day, defendant passed Belanger's camp with a rifle and gunny sack and told Belanger that he was going hunting. Belanger thought this odd because the day was foggy and "you couldn't see fifteen feet ahead of you." Belanger testified, however, that the fog lifted around noon.

Doucet testified that two or three days after December 22nd, he observed defendant taking some of Paulson's clothes and a suit case out of the camp area. Defendant told Doucet that he was going to put them in storage. The records of Bill's Second-Hand Store in Sacramento, however, show, and defendant admits, that on December 23rd, he sold certain articles belonging to Paulson. Defendant used the assumed name, James Owens, and gave the address 1515 Fourth St., Sacramento, where he had previously resided. On December 29th, he sold a shirt of his own to the same store under the same assumed name.

On or about December 24th, Doucet observed defendant burning straw that he had taken from the bunk in the cabin. He replied to Doucet's questioning that he was burning it because the mice had been making nests in it. Defendant replaced the straw with three sofa cushions that he had purchased after Paulson's disappearance.

Early in January, 1949, Earl King and two others constructed a cabin in the Jibboom Street jungle area about 100 feet from the one occupied by defendant. While they were building, defendant went to them and told them that the land was "private property or leased property." King replied that he had as much right there as anyone else. Defendant said then, "Well, if you are going to build down here, be sure and use my latrine," and from then on, King and his companions did so. On January 18th, King discovered the headless body, later identified by fingerprints as that of Paulson, floating in the American River near the camp area.

On January 20th, three deputy sheriffs went to Paulson's shack then occupied by defendant. When they questioned him about Paulson, defendant explained Paulson's departure as he had previously to Doucet and Belanger. The officers found a small caliber rifle, a small hatchet, and some sash cord rope in the shack.

On January 21st, the deputy sheriffs returned to the jungle area to search for the head of the body. Their attention was directed to the latrine that defendant had constructed on the day that, according to his testimony, Paulson had left for Ventura. After digging into the latrine about two feet, they discovered a folded pair of dark trousers; a foot lower they discovered a large bundle of clothing in an olive green tarpaulin. The bundle included a large green blanket, sleeping bag, dark coat, red checkered shirt, glove, and a large blanket. These were identified by William Allen as the property of or similar to the property of Paulson.

The officers also removed two sheet blankets from the bunk in the cabin, and pieces of wood from the bottom and headboard of the bunk, which were marked with reddish stain. A clinical laboratory technologist, Roy B. Johnson, Jr., testified that the stains on the tarpaulin, the coat, and plaid shirt taken from the latrine, and the two blankets from the bunk, were human blood. Johnson found blood on the sleeping bag and blanket taken from the latrine but was unable to determine whether it was human blood. David Q. Burd, a criminologist of the State Bureau of Criminal Investigation, testified that the small hatchet found in the shack on January 20th, the pieces of wood taken from the bunk, another hatchet owned by Paulson, and a hammer left with Paulson by Allen had blood of unknown origin on them. He testified that the block of wood taken from the headboard of the bunk had human blood on it. Dr. Wallace, the autopsy surgeon, testified that the blade of the small hatchet fitted "almost perfectly" the wounds on Paulson's neck. He testified also that the hammer part of the hatchet could have been used to cause the fractures of the skull.

At the time defendant was questioned on January 21, 1949, he was asked to tie a knot in the sash cord found in the decedent's cabin. The knot that he tied was similar to the knot in the rope around the ankles of the decedent's body.

Defendant was first tried in April, 1949, but the jury was unable to agree upon a verdict. Thereafter on April 22nd, Deputy Sheriff Chapman returned to the site of the Paulson shack, which had been torn down, to make a further investigation on his own initiative. He dug into what had been the dirt floor of the cabin and found buried there a small bottle containing $50.00 in currency. The next day Chapman returned with two other deputies. After more digging they uncovered four small pieces of newspaper that were identified as parts of the Sacramento Union dated January 17, 1949. Deputy Sheriff Munizich testified that the newspaper came from the hole in which the bottle was found. Counsel for defendant vigorously attacked the testimony given by Deputy Sheriffs Chapman, Munizich, and Mason concerning their visit after the first trial to the site of Paulson's shack.

He said, "We contend that this case and the evidence produced herein is the result of planted evidence." There is no evidence in the record to support this contention.

In statements to the officers and in his testimony, defendant consistently adhered to his original account of Paulson's departure and the reasons therefor. His statements and testimony varied as to the articles Paulson took from the shack, and he admitted that he lied to Doucet about Paulson's taking several articles that in fact he did not take. He offered the explanation that Doucet was in the habit of "cleaning up" after the former occupants had gone. Defendant at first denied the sale of Paulson's articles to the secondhand store, but after his handwriting had been compared with the signature in the sale book, he admitted making the sale. He admitted working on the latrine the day Paulson left and asking others to use it, but he denied placing Paulson's property in it. He has always denied that he killed Paulson.

The trial court instructed the jury that "Crime may be proven by circumstantial evidence as well as by direct evidence of an eye witness, but the facts and circumstances in evidence must be consistent with each other and with the guilt of the defendant, and inconsistent with any reasonable theory of his innocence, and must show his guilt beyond a reasonable doubt.

"If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.

"You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilty beyond a reasonable doubt."

[1, 2] These instructions afford ample protection to a defendant in a case based on circumstantial evidence. See People v. Bender, 27 Cal.2d 164, 174, 163 P.2d 8; People v. Green, 13 Cal.2d 37, 44, 87 P.2d 821. Guided by these instructions, the jury found defendant guilty of murder in the first degree. Defendant contends that the evidence is insufficient to justify the conviction on the ground that it fails to meet the requirement (embodied in the first paragraph of the instructions quoted above) that "resting its case upon circumstantial evidence, the prosecution must not only show a set of circumstances consistent with guilt, but must show a set of circumstances inconsistent with any reasonable theory of innocence." The quotation is from opinion of Justice Preston in People v. Lamson, 1 Cal.2d 648, 653, 36 P.2d 361, 363; cf. People v. Perkins, 8 Cal.2d 502, 510; 66 P.2d 631; People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. This contention confuses the function of court and jury by implying that if the court itself can formulate a reasonable theory of innocence from the evidence it must reverse a judgment of conviction. It is not for the court, however, to determine whether it can formulate such a theory. It must assume in favor of the verdict the existence of every fact that the jury could reasonably deduce from the evidence and then determine whether or not a reasonable jury could find the defendant guilty beyond a reasonable doubt. "If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury." People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780. Thus, "the rule that the circumstances relied upon by the prosecution must be consistent with guilt and inconsistent with an hypothesis of innocence is a rule of instruction for the jury, and is not

the rule for the guidance of the court on review." People v. Newland, supra, 15 Cal. 2d at page 682, 104 P.2d at page 780.

[3-7] "The functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or non-existence of a reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make. The law recognizes that the scope of a reasonable mind is broad. Its conclusion is not always a point certain, but, upon given evidence, may be one of a number of conclusions. Both innocence and guilt beyond reasonable doubt may lie fairly within the limits of reasonable conclusion from given facts. The judge's function is exhausted when he determines that the evidence does or does not permit the conclusion of guilt beyond reasonable doubt within the fair operation of a reasonable mind." Curley v. United States, 81 U.S.App.D.C. 389, 160 F.2d 229, 232.

In the light of the evidence in this case the jury could reasonably be convinced beyond a reasonable doubt that defendant killed Paulson to obtain possession of his belongings and money.

When the witness Doucet met Paulson in Sacramento on December 21st, 18 hours before he disappeared, Paulson had just acquired a lamp for his cabin and gave no indication that he was likely to leave Sacramento suddenly. Immediately after Paulson's disappearance the next day, defendant assumed ownership of Paulson's goods, much of which Paulson would normally have carried with him while travelling. The first morning after that disappearance defendant dug the latrine in which the decedent's bloody belongings were found. He encouraged others to use the latrine.

Defendant sold Paulson's goods under a fictitious name and lied when questioned about it. He admitted selling the goods only when informed that state experts had compared the handwriting in the sales-book of the secondhand store and samples of his handwriting, and had found that they were similar.

Two days after Paulson disappeared, defendant was seen burning straw from the bunk Paulson had used. Defendant admitted "cleaning up around" the bunk and burning "reddish" paper that had been under the straw. A block of wood subsequently taken from the headboard of that bunk by the officers, and the two blankets found on the bunk on January 21st, were stained with human blood. The rope found in the cabin on January 21st was the same type as that used to tie the ankles of Paulson's body. When defendant was asked on January 21st to tie a knot in that rope, he tied one similar to that used to tie the legs of the corpse.

The blade of the small hatchet found in the cabin fitted the wounds on Paulson's neck "almost perfectly." According to the testimony of the autopsy surgeon, the hammer part of the hatchet could have been the blunt instrument used for the fatal blows.

A bottle containing the sum that defendant specified as the amount stolen from Paulson was found buried in the floor of the shack. In the same hole were newspapers dated January 17, 1949, three weeks after Paulson's disappearance on December 22, 1948.

[8] In the light of this cogent evidence we cannot say that a reasonable jury could not find defendant guilty beyond a reasonable doubt.

The judgment and the order denying a new trial are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

34 Cal.2d 632

TIMM AIRCRAFT CORPORATION v. BYRAM, County Tax Collector of County of Los Angeles et al. (UNITED STATES, Intervenor).

L. A. 20527.

Supreme Court of California, in Bank.
Jan. 20, 1950.

The Timm Aircraft Corporation sued H. L. Byram, County Tax Collector of the County of Los Angeles, John R. Quinn, County Tax Assessor of the County of Los Angeles, William A. Smith and others, Board of Supervisors of the County of Los Angeles, the County of Los Angeles, a municipal corporation, and the City of Los Angeles, a municipal corporation, to recover ad valorem taxes for the year 1944–1945 on a bank deposit assessed to plaintiff as a solvent creditor and paid under protest. The United States intervened.

The Superior Court, Los Angeles County, John Gee Clark, J., entered judgment for plaintiff, and defendants appealed.

The Supreme Court, Traynor, J., held that the deposit belonged to plaintiff for purposes of taxation by state subdivisions, and not to the United States.

Judgment reversed.

Carter and Schauer, JJ., dissented.

Prior opinion 202 P.2d 771.

1. Taxation ⚷6

A state tax upon property or receipts of a private contractor cannot be avoided on doctrine of inter-governmental tax immunity merely because the United States eventually bears the burden of the tax.

2. Taxation ⚷6, 18

The asserted right of one government to be free of taxation by another government does not spell immunity from paying the added cost, attributable to the taxation of those who furnish supplies to the government and who have been granted no tax immunity.

3. Liens ⚷1

The ownership of a lien on personalty precludes legal title in the lienor. Civ. Code, § 2888.

4. Taxation ⚷6

Where, to provide contractor with funds to perform contract, United States advanced payments not to exceed amount specified, and contractor was to deposit funds in special bank account, and if United States terminated contract contractor was required to repay remaining balance, and United States retained lien upon balance to secure repayment of advances, and withdrawals were subject to approval of contracting officer, title to funds was in contractor, rather than in United States, for purposes of ad valorem taxes by state subdivisions, and contractor's interest had taxable value. 31 U.S.C.A. § 529; 50 U.S.C.A.Appendix, §§ 611, 1151, 1171(c); Executive Order No. 9001, §§ 1, 3, 50 U.S.C.A.Appendix, § 611 note.

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TRAYNOR, Justice.

Defendants levied ad valorem taxes for the year 1944–1945 on a bank deposit of plaintiff Timm Aircraft Corporation assessed to it as a solvent credit. Timm paid the taxes under protest and then brought this action to recover them, contending that the deposit was owned by the United States and was constitutionally exempt from taxation by a state or its subdivisions. Judgment was entered for Timm, and defendants appeal.

Under a contract with the War Department Timm manufactured military aircraft on a cost-plus-a-fixed-fee basis. The contract provided that Timm was not an agent of the United States but an independent contractor at all stages of the manufacture, including the acquisition of materials and the furnishing of labor. Title to all completed work was in the United States and title to all material, equipment, and supplies for which Timm was entitled to reimbursement vested in the United States upon delivery to Timm. The United States could elect to terminate the contract for Timm's failure to prosecute the work with promptness and diligence or when "conditions arise which make it advisable or necessary in the interest of the Government that work be discontinued under this contract." If the United States elected to terminate the contract, it was obligated to make full and prompt settlement of Timm's claims for reimbursement of expenditures before termination, and of all claims against Timm for obligations incurred by it in the performance of the contract.

To provide Timm with the necessary funds to perform the contract, the United States, by two Supplemental Agreements dated April 13, 1942 and March 13, 1943, agreed to make advance payments to Timm of sums not to exceed the amount specified in the agreements. Timm was required to furnish adequate security for the payments and to deposit the funds in a special bank account or accounts "separate from the contractor's general or other funds." The payments were to be used "by the contractor exclusively as a revolving fund for carrying out the purposes of the principal contract and any amendments thereto and not for any other business of the contractor." If the United States terminated the principal contract, Timm was obligated to repay the balance remaining in the account and the United States retained "a lien upon such balances to secure the repayment of the advances, which lien shall be superior to any lien of the bank or any other person upon such account or accounts." Withdrawals from the account were subject to previous approval by the contracting officer or his representative to insure that the funds would be withdrawn only for the purposes of the principal contract.

Pursuant to these agreements three-party deposit agreements were executed by Timm, the United States, and the California Bank of Los Angeles, under which the advance payments were deposited to Timm's account, subject to the terms of the supplemental agreements. Checks drawn on the account had to be countersigned by the contracting officer, whose signature indicated the requisite approval of the withdrawal. Timm periodically drew checks on the special account for the estimated amount of current expenditures. Upon certification by Timm that the funds were to be used for the specified purposes, the contracting officer countersigned the checks. Timm then deposited these checks to its operating account, from which it paid obligations incurred in the performance of the contract. Vouchers for these expenditures were then forwarded to the contracting officer, and after verification and approval the special account was replenished in the amount of the funds so expended. At all times, the amount of the special deposit, plus the amount in Timm's operating account, and the aggregate amount of the outstanding vouchers, was equal to the total advanced to Timm under the agreements. The taxes were levied on the balance on deposit in the special account on the tax day.

Defendants contend that the deposit was not the property of the United States, that it was owned by Timm, and that Timm's interest in the funds deposited was of substantial value to it. Upon examination of the agreements and the statutes under which the advance payments were made, it is our conclusion that this contention is correct, and that the judgment of the trial court must be reversed.

[1, 2] A state tax upon the property or receipts of a private contractor can no longer be avoided on the doctrine of intergovernmental tax immunity merely because the United States eventually bears the burden of the tax. "The asserted right of the one [government] to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish sup-

plies to the Government and who have been granted no tax immunity." State of Alabama v. King & Boozer, 314 U.S. 1, 9, 62 S.Ct. 43, 45, 86 L.Ed. 3; Smith v. Davis, 323 U.S. 111, 116, 65 S.Ct. 157, 89 L.Ed. 107; Curry v. United States, 314 U.S. 14, 18, 62 S.Ct. 48, 86, L.Ed. 9; James v. Dravo Contracting Co., 302 U.S. 134, 160, 58 S.Ct. 208, 82 L.Ed. 155, 114 A.L.R. 318; Metcalf & Eddy v. Mitchell, 269 U.S. 514, 46 S.Ct. 172, 70 L.Ed. 384; Kaiser Co. v. Reid, 30 Cal.2d 610, 628–629, 184 P.2d 879. In the absence of an express Congressional grant of immunity, the tax in question may be avoided only if it is imposed on property of the United States or is so measured by such property as to be in substance and effect a tax thereon. United States v. Allegheny County, 322 U.S. 174, 186, 64 S.Ct. 908, 88 L.Ed. 1209; see Powell, The Remnant of Intergovernmental Tax Immunity, 58 Harvard Law Review, 757, 773–787; cf. State of New York v. United States, 326 U.S. 572, 66 S.Ct. 310, 90 L.Ed. 326.

To perform its obligations under the contract, Timm had to make large expenditures for labor and materials. It could not have done so without outside help in view of the time that would elapse before reimbursement. It could have borrowed from a private lender on the strength of the contracts and deposited the money to its account to cover future expenditures. Had it done so, it would clearly have been regarded as the owner of the account for tax purposes despite any obligation to use it only to finance its performance of the contract. Since interest charges on a private loan, however, would have increased the cost of manufacture to the United States, the Secretary of War chose to pay a part of the contract price to Timm in advance of the expenditures. Timm is no less the owner of the account for tax purposes because the funds were provided by the United States rather than by a private lender.

In view of the prohibition of advances of public funds, 31 U.S.C.A. § 529, special statutory authorization for payment of advances under war contracts was necessary. Congress therefore authorized the making of "*advance,* progress and other *payments* upon such contracts of any per centum of the contract price." 50 U.S.C.A.Appendix, §§ 611, 1151, 1171(c); Exec.Order 9001, §§ 1, 3, 50 U.S.C.A.Appendix, § 611 Note, 6 Fed.Reg. 6787. (Italics added.) Identical provisions in statutes authorizing advance payments have been construed as authorizing passage of title to the contractor as "payments of sums that are expected to become due on the contract, and in the ordinary course of events do become due and are applied accordingly." Enright v. United States, 54 F.2d 182, 188, 73 Ct.Cl. 316; United States v. Butterworth-Judson Corp., 267 U.S. 387, 45 S.Ct. 338, 69 L.Ed. 672. The United States retains only an equitable lien upon the funds superior to all other liens. United States v. Butterworth-Judson Corp., supra, 267 U.S. at page 393, 45 S.Ct. at page 340.

[3, 4] Moreover, the terms of the Supplemental Agreement by which the advances were paid to Timm are consistent only with a holding that title to the deposited funds passed to Timm. The agreement expressly gave the United States a lien upon the funds superior to any and all other liens to secure their repayment under certain contingencies. The ownership of a lien on personal property precludes legal title in the lienor. Civil Code § 2888; Standard Auto Sales Co. v. Lehman, 43 Cal.App. 763, 766, 186 P. 178. Subject to the approval of the Contracting Officer, Timm was to use the account "as a revolving fund for carrying out the purposes of the principal contract," to pay the obligations necessarily incurred in performing the contract that Timm would otherwise have had to pay from its general funds. The obligations to be paid were Timm's, not those of the United States. The provisions by which Timm agreed to repay the funds to the United States upon certain contingencies carry the implication that it was Timm and not the United States that held title to those funds.

Plaintiff contends that the restrictions imposed upon the use of the funds are so general that Timm cannot be said to be their owner for tax purposes. The restrictions relied upon are: (1) the limitation of the use of the deposit account to the purposes of the principal contract; (2) the condition that withdrawals from the account be subject to previous approval by the Contracting Officer to insure that the funds be used only for those purposes; (3) the condition that the funds must be returned to the United States in the event it chose to cancel the principal contract. The imposition of reasonable restrictions upon the use of property, even the retention of legal title to secure performance of an executory contract, does not make the United States the owner of that property for tax purposes. S. R. A., Inc., v. Minnesota, 327 U.S. 558, 570, 66 S.Ct. 749, 90 L.Ed. 851; Eisley v. Mohan, 31 Cal.2d 637, 643, 192 P. 2d 5; Department of Veterans Affairs v. Board of Supervisors, 31 Cal.2d 657, 192 P. 2d 22; Kaiser Co. v. Reid, 30 Cal.2d 610, 625, 184 P.2d 879. "The form of the transfer is immaterial; the determinative question is whether private rights have supplanted those of the government in so far as the use of the property is concerned." Eisley v. Mohan, 31 Cal.2d 637, 643, 192 P. 2d 5, 9. There can be no doubt here that it was Timm that used the property. It decided what materials were to be acquired, the source of their acquisition and terms of payment therefor, the wages to be paid and the method of their payment. The United States retained the right of supervision only to insure that the funds would not be used for purposes foreign to the principal contract but would "serv[e] their highest and best use." This limitation does not affect their ownership. Kaiser Co. v. Reid, 30 Cal.2d 610, 625, 184 P.2d 879, 888.

The provision giving the United States the right to cancel the principal contract and compel the return of the funds is common to all war contracts in recognition of the contingency of a sudden termination of the war. The advances in United States v. Butterworth-Judson Corp., 267 U.S. 387, 389, 45 S.Ct. 338, 69 L.Ed. 672, were subject to the limitation that "The United States reserved the right to cancel the agreement at any time that its need for the plant or output ceased." Despite that limitation the court found that the private contractor held the title to the deposit account. A similar provision in State of Alabama v. King & Boozer, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3, did not make the contractor the purchasing agent of the United States even though the United States was to reimburse the contractor for the purchase price of materials bought by the contractor and would have to pay the sales tax whose levy thereon the court sustained. In Kaiser Co. v. Reid, 30 Cal.2d 610, 184 P.2d 879, this court sustained an ad valorem tax on the interest of the plaintiff in land and shipyard facilities leased to it by the United States. It was contended that the plaintiff had no taxable interest therein because of the reservation by the lessor of the right to cancel the contracts and retake possession of the yards at its election. This court rejected that contention, stating that this reservation was designed only to "protect the Government in case of a short war or plaintiff's inability to construct vessels properly. So pertinent in this regard is the testimony of the regional Counsel for the Commission before the boards of equalization: 'In fighting a war, of course, the only reason for changing a contractor—that is, that would be justifiable—would be that the contractor wasn't doing his job.'" 30 Cal.2d 610, 619, 184 P.2d 879, 885. This holding is equally persuasive here.

It is contended that the present case is distinguished by the fact that the contractor was not free to use the money without prior approval by the government, and that this requirement of prior approval places the fund under the ownership and control of the Government. It is not unusual for a creditor who advances money for a specified purpose to require as a condition of the advance that all expenditures be subject to his approval to insure their being made only for that purpose. The situation is analogous to that presented to the United States Supreme Court in the case of State of Alabama v. King & Boozer, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3. The United States entered into a contract with a builder to construct an army camp in Alabama on a cost-plus-a-fixed-fee basis. The builder was to be reimbursed for the cost of all material purchased, and title to the purchased materials vested in the United States upon delivery. All purchases were subject to the prior approval of the Contracting Officer, in the same manner and for the same purpose as in the present case. The builder purchased lumber from King & Boozer with the approval of the Contracting Officer for use under the principal contract. Alabama's effort to collect a sales tax on the transaction was resisted on the theory that the builder purchased the materials as agent of the United States and that the tax was invalid because it was levied upon a purchase by the United States. If the right of prior approval of the manner in which expenditures are made constitutes ownership of the funds expended, it would follow that purchases made with that approval are made by the purchaser as agent of the one whose approval must be secured. That contention, however, was rejected: "But however extensively the Government may have reserved the right to restrict or control the action of the contractors * * * neither the reservation nor the exercise of that power gave the contractors the status of agents of the Government to enter into contracts or to pledge its credit." 314 U.S. 1, 13, 62 S.Ct. 43, 47, 86 L.Ed. 3; Curry v. United States, 314 U.S. 14, 18, 62 S.Ct. 48, 86 L.Ed. 9. The reasoning of the court is clearly applicable to the present case and compels the conclusion that Timm was in fact the owner of the funds.

Timm also contends that even if it has a property interest in the deposit, that interest is of no value to it. On the contrary, it was of substantial value to it. It enabled Timm to purchase the materials and hire the labor necessary to the performance of its contract, for which it was to receive a substantial fee. Had its general funds on hand been adequate, it could hardly have avoided taxation thereof by contending that they were valueless to it because they were used only for the performance of the government contract. As this court stated in Kaiser Co. v. Reid, 30 Cal.2d 610, 625, 184 P.2d 879, 888, where plaintiff urged that its interest in property leased from the United States had no value because no profit was directly derived from its use, "even assuming that plaintiff did not make any 'profit' out of the shipyards as such, but only out of its 'services' in performing the construction work, that fact would not negative the propriety of an assessment based on its 'beneficial use' of the property as an entrepreneur engaged in the management of a business enterprise. Plaintiff had a property interest in the shipyards by virtue of its 'exclusive use and possession' thereof * * *." That reasoning applies with equal force here.

The judgment is reversed.

GIBSON, C. J., and SHENK and SPENCE, JJ., concur.

EDMONDS, Justice (concurring and dissenting).

In my opinion, the special bank account was the property of the United States government, and therefore erroneously taxed as belonging to Timm Aircraft. The fact that the United States government could have the funds in the account returned to it at any time when, "* * * in the opinion of the Chief of the Air Corps, or his duly authorized representative, the unobligated balance of the advance payments made by the Government * * * exceeds the amount necessary for the current needs of the Contractor, as determined by the Chief of the Air Corps, or his duly authorized representative * * *," Supplemental Agreement, No. 1, line 89, is inconsistent with any other view.

However, I cannot agree that the aircraft company followed the proper procedure in seeking relief under sections 5136–5143 of the Revenue and Taxation Code. The mode of recovery for taxes erroneously or illegally collected from one not the owner of the taxed property is specified by sections 5096–5107 of the Revenue and Taxation Code. Timm Aircraft did not comply with these sections. It filed no claim for refund, as the statute requires and, for that reason, is not entitled to recover the amount which it paid.

The first question for determination in measuring the corporation's right to recover is whether the payment made by it was a voluntary one. As stated by Mr. Justice Shenk in Southern Service Co., Ltd., v. Los Angeles County, 15 Cal.2d 1, 7, 8, 97 P. 2d 963, 967: "It is the settled law of this state that illegal taxes voluntarily paid may not be recovered by the taxpayer in the absence of a statute permitting a refund thereof; and in the absence of such statute only illegal taxes paid under duress, coercion or compulsion are considered to have been involuntarily paid and therefore recoverable. * * * [T]he filing of a protest with a payment of illegal taxes otherwise voluntarily made does not deprive the payment of its voluntary character. [Citing Brumagim v. Tillinghast, 18 Cal. 265, 269, 271, 275, 79 Am.Dec. 176; and other authorities]." To the same effect is Security Nat. Bank v. Young, 8 Cir., 55 F. 2d 616, 619.

In deciding the Brumagim case, supra, 18 Cal. at page 271, this court said: "The illegality of the demand paid constitutes of itself no ground for relief. There must be, in addition, some compulsion or coercion attending its assertion, which controls the conduct of the party making the payment * * *. If he voluntarily pay an illegal demand, knowing it to be illegal, he is, of course, entitled to no consideration; and if he voluntarily pay such demand in ignorance or misapprehension of the law respecting its validity, he is in no better position, for it would be against the highest policy to permit transactions to be opened upon grounds of this character." The later decisions were reviewed at length in the Southern Service case. Uniformly they hold that a payment of taxes under the circumstances shown by the present record, although made under protest, is a voluntary one.

Statutory authority for the refund of taxes "erroneously or illegally collected" dates from 1872 when the Legislature enacted section 3804 of the Political Code. As later amended, and in effect for many years, it allowed a refund only upon a claim, verified by the person who paid the tax, and filed within three years thereafter.

In 1893, the Legislature enacted section 3819 of the Political Code. It declared that "* * * the owner of any property assessed * * * who may claim that the assessment is void in whole or in part, may pay the same to the tax collector under protest, * * * and when so paid under protest, the payment shall in no case be regarded as voluntary payment." By other provisions of the section, "And such owner may at any time within six months after such payment bring an action against the county, * * * to recover back the tax so paid under protest; * * *."

Sections 5096 to 5107 of the Revenue and Taxation Code have continued in effect the provisions of section 3804 of the Political Code. The Legislature also placed in sections 5136 et seq., of the new code, the procedure authorized by section 3819 of the Political Code, allowing a property owner to pay, under protest, the amount of a tax and then sue to recover it. But now, as at the time the legislation was included in the Political Code, the statutes apply to different situations. Sections 5096 et seq. of the Revenue and Taxation Code do not limit to an owner of property the right to recover a tax "erroneously or illegally collected". However, they require, as did the predecessor statute, the filing, within a specified time, of a verified claim by the person who paid the tax. The later statutes based upon section 3819 of the Political Code, by their terms, relate only to a "property owner".

This distinction was expressly recognized in Warren v. City & County of San Francisco, 150 Cal. 167, 88 P. 712, which held: "Section 3819 [now sections 5136–5143, Revenue and Taxation Code] has no application. That section provides that the 'owner' of any property assessed, who may claim that the assessment is void, may pay his tax under protest, specifying the grounds of the protest, and that, when so paid under protest, the payment shall not be regarded as voluntary. The plaintiff herein was not the 'owner' of the land assessed nor of any land bordering or adjoining that portion of Caroline street * * *."

This application of the statute has been recognized and adopted by the Federal Circuit Court of Appeals, 9th Circuit, Southern California Telephone Co. v. Hopkins, 13 F.2d 814, 819, and also by the United States Supreme Court, Hopkins v. Southern California Telephone Co., 275 U.S. 393, 399, 48 S.Ct. 180, 182, 72 L.Ed. 329. In the latter case, Mr. Justice McReynolds said: "Section 3819 gives a remedy to the *owner;* and Warren v. San Francisco, 150 Cal. 167, 88 P. 712, intimates quite strongly that it applies only to actual owners."

It is difficult to see how any conclusion other than that stated in the Warren case logically can be reached, considering the language used by the Legislature. One remedy (secs. 5096–5107, Revenue and Taxation Code) is open to any *person,* including an owner, who pays a tax "erroneously or illegally collected" and thereafter files a verified claim for refund within the specified time. The board of supervisors is authorized to allow such a claim when the facts justify that action. The other procedure (secs. 5136–5143, Revenue and Taxation Code) is applicable only to "* * * *any property owner* * * *" (secs. 5136, 5139). He is not required to file claim, and relief may be given to him only by judgment of the superior court in an action brought within six months after payment of the tax.

I see no valid reason for departing from the construction of a tax statute unanimously placed upon it by the justices of this court in the Warren case forty years ago and not since challenged. The restriction of the legislation as applying only to "an owner" has been left unchanged by the Legislature, although the statute has been amended in other particulars. Moreover, the decision has been accepted by the Federal Circuit Court of Appeals and also by the United States Supreme Court as the law of this state.

Timm Aircraft consistently has maintained that on tax day it was not the owner of the money assessed to it. However, it did not comply with the essential requirements laid down by the Legislature for a nonowner of property who pays a tax erroneously or illegally collected from him. It filed no claim for refund within the time specified, and for that reason it is not entitled to recover.

I therefore concur in the judgment of reversal solely upon the ground that the taxpayer did not follow the procedure entitling it to a refund.

CARTER, Justice.

I dissent.

The majority opinion holds that the taxing agencies of this state may tax funds which the United States Government has allocated for the payment of obligations due contractors on Government work before the Government has released control of such funds, thus permitting the taxing of funds actually owned and controlled by the United States Government. In my opinion such holding is in direct violation of the established rule of reciprocal immunity against the taxation by either the State or Federal Government of property owned by the other. McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579; United States v. Allegheny County, 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209.

A brief statement of the facts will suffice. On tax day, the first Monday in March, 1944, plaintiff, a corporation, was engaged in the business of producing military aircraft, and as such it had a contract to manufacture aircraft for the United States dated April 7, 1942, referred to as a "cost-plus-a-fixed-fee" contract. Thereunder the plaintiff was to be paid by the Government, as an independent contractor, the costs of production plus a fixed fee. In order to provide plaintiff with capital to conduct its operations, supplemental agreements were made under which it was provided that the United States was to "make advance payments" within the limits stated, security for which was to be furnished by plaintiff; that such payments should be deposited in a special bank account which was to be kept separate from plaintiff's general or other funds; that the balance in such account or accounts should be used "by the contractor exclusively as a revolving fund for carrying out the purposes of the principal contract and any amendments thereto and not for other business of the contractor"; that withdrawals from such special account or accounts should "be made subject to the prior written approval of the contracting officer or his duly authorized representative"; that any balances in such account or accounts should "secure the repayment of the advances" and that the Government should "have a lien upon such balances to secure the repayment of such advances, which lien shall be superior to any lien of the bank or any other person upon such account or accounts by virtue of assignment to it of such contract or otherwise"; that the bank should not be liable "for the withdrawal of any funds from said special account upon checks, properly endorsed and signed by the contractor, except that after the receipt by the bank of written directions from the Chief of the Air Corps, or his duly authorized representative, the bank shall act thereon and be under no liability to any party hereto for any action taken in accordance with the said written directions"; that any excess money should be "repaid by the contractor to the Government" under certain circumstances specified in the contract; that in the event of cancellation of the principal contract the contractor should "return to the Government" the unliquidated balance of any advance payment; that in the event it was determined that the advance payments exceeded the amount necessary for the current needs of the contractor, the excess should "be promptly returned to the Government".

Pursuant to the agreement, arrangements were made with a bank wherein it was agreed that a special account in plaintiff's name was to be set up for the advances and paid out in accordance with the agreements. The Government advised the bank that no checks drawn on the account by plaintiff were to be honored unless countersigned by the named federal officer.

On the first Monday in March, 1944, there was $453,353.43 in the account and the defendant County of Los Angeles levied an ad valorem property tax thereon against plaintiff of $453.35, which it paid under protest.

Plaintiff and intervenor, United States, claim, and the trial court found, that the account belonged to the Government and plaintiff had no taxable interest therein, and that if it had an interest, such interest was of no value to plaintiff; that therefore the account was illegally taxed to plaintiff.

Whether or not the account (the debt of the depository bank) belonged to the Government or to plaintiff depends upon the agreements. The basic cost-plus-fixed-fee contract provides that advance payments "may" be made *when the federal officer "deems such action necessary"*, and if made shall be in terms prescribed by the officer. The Government may terminate the contract at any time. Under the supplemental agreements, it is provided that advances shall be made and a special account created, but also that *"Withdrawals from such special account or accounts shall be made subject to the prior written approval of the Contracting Officer or his duly authorized representative."* If the amount in the account exceeds, *"in the opinion"* of the federal officer, the amount necessary, the excess must be returned to the Government and under the special account agreement with the bank, the money is to be paid out as set forth in the agreements.

The foregoing provisions of the agreements point unerringly to the conclusion of the trial court that there was no vestige or incident of ownership in plaintiff of the special account. Contrasted with the facts here are the circumstances present in Kaiser Co. v. Reid, 30 Cal.2d 610, 184 P.2d 879, where this Court repeatedly stressed the right of "exclusive possession" held by a lessee from the United States, and it was that right of possession upon which the tax was levied. While it is true that the United States was to have a lien on the account, which indicates lack of ownership in it, that the account stood on the bank's records in plaintiff's name but only nominally, and that the moneys deposited in the account were spoken of as "advances", yet withdrawals from the account *were wholly under the control of the Government.* Plaintiff did not have the right of use, possession, or title, all incidents of ownership. The exercise by it of any of those prerogatives of ownership was completely under the control of the United States. Therefore, plaintiff had no interest equitable or legal in the account and likewise it was not a solvent credit belonging to it. To be such a credit, it would have to be payable to plaintiff without any strings or conditions attached. It is apparent that the "advances" to the account were not really advances as ordinarily understood, that is, a *payment* before due date, for they were not payments to plaintiff inasmuch as that would imply possession and right to use the sums paid. But the account was not then usable by plaintiff without the prior permission of the Government. An advance, as that term is ordinarily used, was thus not made until withdrawals had been made from the account. Then and then only was a payment made. The account was a mere field or local arrangement whereby the Government had the funds on the spot where needed, thus facilitating their disbursement at a time when fast action was of the essence.

The cases relied upon by Justice Traynor are not in point. In Kaiser Co. v. Reid, 30 Cal.2d 610, 184 P.2d 879, as above stated, the contractor leasing from the Government was in possession of the property and had the right of *exclusive* use thereof. Here, Timm is neither in possession of the account, nor does it have any right of use unless the Government so wishes, let alone an exclusive right. In Enright v. United States, 54 F.2d 182, 73 Ct.Cl. 416, the advance payments *had already been made* to the contractor. They were not in an account over which the Government had control. United States v. Butterworth-Judson Corp., 267 U.S. 387, 45 S.Ct. 338, 69 L.Ed. 672, is clearly distinguishable. The payments were there *made* to the contractor, thus title passed. They were not in an account under the Government's control. In State of Alabama v. King & Boozer, 314 U.S. 1, 62 S.Ct. 43, 47, 86 L. Ed. 3, the sole question was whether a contractor was an agent for the Government when it purchased property to fulfill its contract with the Government, the title to which passed to the latter on acquisition, and thus whether a sales tax on the sale of the property was valid. Plainly, the property was purchased by the contractor for *his* use in fulfilling *his* contract, and thus it was a sale to him and hence taxable. For illustration, it is said *immediately following* the quotation therefrom by Justice Traynor: "It can hardly be said that the contractors were *not free to obligate themselves for the purchase* of material ordered. *The contract contemplated that they should do so* and that the Government should reimburse them for their expenditures. It is equally plain that they *did not assume to bind the Government to pay* for the lumber by *their* order, approved by the Contracting Officer, which stipulated that *it did not bind or purport to bind the Government.* The circumstance that the title to the lumber passed to the Government on delivery *does not obligate* it to the contractor's vendor under a cost-plus contract more than under a lump sum contract. * * * We cannot say that the contractors were not, or that the Government was, bound to pay the purchase price, or that the contractors were not the purchasers on whom the statute lays the tax." [Emphasis added.] In the instant case the account was not Timm's for it could not be used except upon the approval of the Government.

It is urged by appellant, and Mr. Justice Edmonds holds, that the instant action cannot be maintained by plaintiff because it fails to qualify under the statute permitting an action to recover taxes paid under protest by the owner of the property erroneously assessed. Plaintiff did not proceed under the claim for refund provisions of the statute. Its action is pursuant to the following provision: "After taxes are payable, any property owner may pay the taxes on *his property* under protest. A payment under protest is not a voluntary payment." Rev. & Tax. Code, sec. 5136. Section 5137 of that Code authorizes the action when the tax is paid under protest, and the following section reads: "The action may be brought only: (a) As to the portion of the assessment claimed to be void. (b) On the grounds specified in the protest. (c) By the owner, his guardian, executor, or administrator." Rev. & Tax.

Code, sec. 5139. The refund provisions authorize the making of a claim for refund to the board of supervisors, Rev. & Tax. Code, secs. 5096–5107, and an action by the taxpayer if the claim is disallowed. Id. § 5103.

There are various considerations which clearly point to the conclusion that the word "owner" as used in the provisions for recovering a tax paid under protest, Rev. & Tax. Code, sec. 5136 et seq., supra, must be interpreted to include a person who both paid the tax and is the one against whom the assessment was levied. The remedies by way of claim for refund and payment under protest are cumulative. Brill v. County of Los Angeles, 16 Cal.2d 726, 108 P.2d 443; Birch v. County of Orange, 186 Cal. 736, 200 P. 647; Stewart Law & Collection Co. v. County of Alameda, 142 Cal. 660, 76 P. 481. Statutory authority for the recovery of a tax levied pursuant to a void assessment paid under protest is "befitting to this more enlightened age", Hellman v. City of Los Angeles, 147 Cal. 653, 655, 82 P. 313, 314, and, being remedial in nature, should be given a liberal construction. See Hellman v. City of Los Angeles, supra; Stewart Law & Collection Co. v. County of Alameda, supra; Brenner v. Los Angeles, 160 Cal. 72, 116 P. 397. The relief afforded by the payment under protest provisions takes the place of an action for money had and received, eliminating the common law requirement of payment under duress. Aalwyn's Law Institute v. San Francisco, 39 Cal.App. 414, 179 P. 220. The person against whom the assessment is made, and the person who paid the tax, is the one who has a claim for money had and received inasmuch as he was the payor. If such a person may not recover, then there is no recovery under the payment under protest method, for a person against whom the tax was assessed and who paid it, although not the owner of the property assessed, would never be the owner and would not have the remedy. That is clearly contrary to the liberal spirit of such provisions and would deny what they permit, an action to recover taxes paid under protest where the assessment is void. See, Rev. & Tax. Code, secs. 5137 (a), 5139(a), 5141. The County asserted that plaintiff was the owner of the account and as far as the assessment goes, it was declared to be the owner. I conclude, therefore, that an assessee of property who pays the tax levied thereon under protest has an action to recover when the assessment was void for lack of ownership in the taxpayer.

The case of Warren v. City and County, 150 Cal. 167, 88 P. 712, relied upon by Justice Edmonds, is not controlling. There the taxpayer was wholly and entirely a volunteer. He paid taxes on property which was not assessed to him and in which he had no vestige of an interest. It was a part of a public street. Moreover, that case failed to give the liberal construction required.

Being convinced that the money in the account here involved was not taxable, and that plaintiff pursued the proper remedy for its recovery, I would affirm the judgment of the trial court.

SCHAUER, J., concurs.

95 Cal.App.2d 831

PEOPLE v. BOYD.

Cr. 4414.

District Court of Appeal, Second District, Division 2, California.

Jan. 31, 1950.

John Horace Boyd was convicted in the Superior Court of Los Angeles County, Thomas L. Ambrose, J., of committing lewd and lascivious acts with a child, and he appealed.

The District Court of Appeal, Wilson, J., held that the admission of certain evidence was not error, that objection first made in the District Court of Appeal as to admission of evidence was too late, that evidence was sufficient to sustain conviction, that corroboration of prosecutrix was not required, that failure of prosecutrix to make prompt complaint did not render her story unworthy of belief, and that Superior Court was not biased.

Judgment affirmed.

1. Criminal law ⚷369(8)

Generally, when a person is charged with a felonious commission of sexual offense, evidence of similar acts committed on persons other than prosecuting witness is ordinarily inadmissible.

2. Criminal law ⚷371(9), 372(1)

In prosecution for lewd acts committed with a child, evidence that defendant, about a week after commission of offense charged, committed the same act on prosecutrix's sister in presence of prosecutrix, was admissible for purpose of showing defendant's lewd and lascivious intent and his disposition to commit the offense charged and the probability of his having committed it. Penal Code, § 288.

3. Criminal law ⚷369(2)

Evidence of similar acts with other persons, when relevant to the issues and otherwise admissible, is not to be excluded merely because it reveals the commission of an offense other than that charged.

4. Criminal law ⚷369(2)

If evidence of another crime is necessary or pertinent to proof of the charge against a defendant, it will not be excluded merely because it involves the commission of another crime.

5. Criminal law ⚷1036(1)

Objection first made in the District Court of Appeal to the admission of evidence, is too late.

6. Infants ⚷20

Evidence was sufficient to sustain conviction of lewd and lascivious acts committed on a child. Penal Code, § 288.

7. Infants ⚷20

In prosecution for lewd and lascivious acts committed with a child, corroboration of the child was not required. Penal Code, § 288.

8. Infants ⚷20

In prosecution for lewd and lascivious acts committed with a child, child's story was not rendered unworthy of belief because child failed to make complaint to her mother until she was questioned by her mother after child's sister had told the mother of a similar act committed on the sister. Penal Code, § 288.

9. Criminal law ⚷1159(2)

Where there is evidence that a crime has been committed and that defendant was the perpetrator, a reviewing court will not attempt to determine the weight of the evidence, and conviction will not be set aside on appeal on ground of insufficiency of the evidence unless it is made to appear clearly that on no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in the trial court.

10. Criminal law ⚷1144(10)

Trial judge would not be presumed to have been so prejudiced in prosecution for lewd and lascivious acts, by reason of the charge, that he could not give defendant a fair and impartial trial. Penal Code, § 288.

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William V. Krowl, O. N. Normandin, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Kent C. Rogers, Deputy Attorney General, for respondent.

WILSON, Justice.

Defendant was convicted of having violated section 288 of the Penal Code, the act charged having been committed upon his daughter ten years of age. He has appealed from the judgment of conviction.

The prosecutrix testified that her father committed the act while she and her younger sister were sleeping in the same bed, the sister having been asleep at the time; that about a week later he committed the same act upon her sister, they having exchanged sides of the bed as they frequently did without their parents' knowledge.

[1-4] Defendant contends admission of the testimony as to the offense upon the

younger child was prejudicial error. The general rule is that when a person is charged with the felonious commission of a sexual offense evidence of similar acts committed upon persons other than the prosecuting witness is ordinarily inadmissible. People v. Asavis, 22 Cal.App.2d 492, 494, 71 P.2d 307. But there are exceptions to this general rule. The evidence was admissible in the instant case for the purpose of showing defendant's lewd and lascivious intent. People v. Knight, 62 Cal. App. 143, 146, 216 P. 96; People v. Owen, 68 Cal.App.2d 617, 620, 157 P.2d 432, his disposition to commit the act charged and the probability of his having committed it. People v. Jewett, 84 Cal.App.2d 276, 279, 190 P.2d 330, and as tending logically and by reasonable inference to prove the commission of the act of which he was accused. People v. Peete, 28 Cal.2d 306, 315, 169 P.2d 924; People v. Dabb, 32 Cal.2d 491, 499, 197 P.2d 1. Evidence of similar acts with other persons when relevant to the issues of the case and otherwise admissible is not to be excluded merely because it reveals the commission of an offense other than that charged. People v. Carmelo, 94 Cal.App.2d 301, 210 P.2d 538. If evidence of another crime is necessary or pertinent to proof of the charge against a defendant it will not be excluded merely because it involves the commission of another crime. People v. Sanders, 114 Cal. 216, 230, 46 P. 153.

[5] Defendant relies upon People v. Asavis, supra. In that case the evidence which caused the reversal concerned acts upon other minors out of the presence of the prosecutrix. In the instant case the act occurred one week after the offense charged in the information, and was committed upon the sister of the prosecutrix in the latter's presence under circumstances from which it may be inferred that defendant intended a second offense upon the prosecutrix. Moreover there was no objection to the reception of the evidence, no motion to strike it, and defendant's counsel cross-examined the prosecutrix concerning the offense on her sister. The objection first made in this court is too late. People v. Simeone, 26 Cal.2d 795, 804, 161 P.2d 369.

[6-8] Defendant's contention that the evidence is insufficient to support the judgment is untenable. The prosecutrix was more than ten years of age at the time she testified. The court interrogated her as to her qualifications as a witness, and defendant admitted she was qualified. She described the act committed upon her by her father and a vigorous cross-examination did not cause her to change or contradict her testimony. Corroboration of the prosecuting witness is not required. People v. Raich, 26 Cal.App. 286, 287, 146 P. 907; People v. Campbell, 80 Cal.App.2d 798, 800, 182 P.2d 626. The failure of the prosecutrix to make complaint to her mother concerning her father's act until she was questioned by her mother after her sister had told of the act committed upon the latter does not render her story unworthy of belief. People v. Westek, 31 Cal.2d 469, 472, 190 P.2d 9. In a conversation between defendant and his wife at which the prosecutrix was present defendant's wife repeated what the child had said to her. Defendant did not deny the act but said, "Well, if that is the truth, just say the truth." He made no further comment.

[9] Where there is evidence that a crime has been committed and that the defendant was the perpetrator, a reviewing court will not attempt to determine the weight of the evidence, and the judgment of conviction will not be set aside on appeal on the ground of insufficiency of the evidence unless it be made to appear clearly that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the trial court. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. The evidence is sufficient not only to sustain the judgment but to negate defendant's further contention that it is insufficient to establish his guilt beyond a reasonable doubt.

[10] Concerning defendant's comment that the accusation against him, alleged to have been committed upon his daughter, may have so shocked the trial judge (the

case was tried without a jury by stipulation) that "his usual impartial and unbiased outlook must have been severely shaken," it need only be said that the trial judge has had many years' experience in the trial of criminal cases and it will not be assumed that he was so prejudiced by reason of the charge that he could not give defendant a fair and impartial trial.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

95 Cal.App.2d 599

HILL v. WESTBROOK'S ESTATE et al.

Civ. 17113.

District Court of Appeal, Second District, Division 3, California.

Jan. 17, 1950.

Action by Minnie Hill, also known as Minnie Westbrook, against the estate of Charles Westbrook, deceased, and Edward J. Westbrook, administrator of the estate of Charles Westbrook, deceased, to enforce claim against deceased's estate.

The Superior Court of Los Angeles County, Leonard Kaufman, J., entered judgment for plaintiff, denied defendants' motion for new trial, and defendants appealed.

The District Court of Appeal, Vallée, J., held that the order denying defendant's motion for new trial was not appealable, that item of monies contributed by plaintiff to deceased or expended in his behalf should have been filed separately from those included in services performed by plaintiff, that action seeking recovery of monies contributed and for services was not barred by statute of limitations, and that action should have been dismissed as to estate of Charles Westbrook.

Judgment reversed.

1. Appeal and error 🔑110

An order denying a motion for a new trial is nonappealable.

2. Work and labor 🔑7(7)

When a man and woman knowingly live together in a meretricious relationship, in absence of an express agreement, oral or written, that she be compensated for services performed, there is no implied obligation on part of man to compensate her for household services rendered by her.

3. Contracts 🔑112, 142

Where parties live together in illicit relationship during time services are performed, an express contract to compensate for services performed as a housekeeper is valid, unless made in contemplation of such illicit relationship, and whether contract is dependent upon illicit relationship is a question of fact.

4. Joint adventures 🔑4(1)

When a man and woman live together under an agreement to pool their earnings and share equally in their joint accumulations, equity will protect interest of each in such property, and even in absence of express agreement to that effect, woman will be entitled to share in property jointly accumulated in proportion that her funds contributed toward its acquisition.

5. Executors and administrators 🔑221(5)

Where claimant sought to recover against estate of deceased for services rendered decedent for keeping house, living with him as man and wife, and bearing decedent two children, performing usual duties of a housewife during all of such time, and earning a salary, part of which was turned over to decedent, evidence supported finding that there was an express agreement on part of decedent to compensate claimant for services performed by her in maintenance of household, rooming house, hamburger stand, and liquor store operated by decedent.

6. Work and labor 🔑7(7)

The law does not award compensation for living with a man as a concubine and bearing him children.

7. Executors and administrators 🔑451(4)

Where claimant was awarded claim against estate of deceased for services performed by her in maintenance of deceased's household, in his rooming house, hamburger stand and liquor store, and included services for living together with him and bearing him children, findings which did not specify reasonable value of different items of services found to have been performed would not be sustained.

8. Executors and administrators ⚷451(4)

In action by woman against deceased's estate for services rendered to him prior to his death and for living with him as his wife and bearing him children and for contributing salary which she earned from time to time, her recovery of amount of salary contributed depended upon proof of actual amount contributed by her, and that item should have been found separately from those included in services performed by plaintiff.

9. Limitation of actions ⚷49(1, 2)

An action to recover for services performed against deceased's estate in maintaining his household, rooming house, hamburger stand, and liquor store owned by deceased, and seeking recovery of monies contributed to deceased, maintained immediately upon deceased's death, was not barred by statute of limitations.

10. Limitation of actions ⚷49(2), 50(2)

Where services are rendered over a period of time under an express or implied agreement that they shall be paid for at termination thereof, statute of limitations begins to run from time last services are rendered.

11. Executors and administrators ⚷420

An estate is not a person or entity, and cannot be sued.

12. Executors and administrators ⚷453(2)

In action by woman to recover for services rendered to deceased, a judgment in her favor should provide that it be paid by the administrator in due course of administration of estate of deceased. Probate Code, § 730.

◆

Hugh E. Macbeth and Hugh E. Macbeth, Jr., Los Angeles, for appellants.

Emmett E. Patten and Glen A. Duke, Monrovia, for respondent.

VALLÉE, Justice.

[1] Appeal by Edward J. Westbrook, administrator of the estate of Charles Westbrook, deceased, from a judgment for plaintiff, and from an order denying his motion for a new trial. Since the latter order is nonappealable, the appeal therefrom is dismissed.

Plaintiff's complaint is founded upon a claim against the estate of Charles Westbrook, deceased, duly presented to, and rejected by, the administrator. A copy of the claim is made a part of the complaint. It reads as follows: "For services rendered decedent from about August 15, 1930, to date of death, by Minnie Westbrook, consisting of keeping house for him during all of said time, living with him as man and wife during all of said time, and during said time bearing decedent two children, namely * * * performing the usual duties of a housewife during all of said time, and earning a salary from time to time during said period, all of which was turned over to said decedent * * * $10,000." The complaint alleged the death of decedent on July 31, 1946, the appointment of the administrator, the filing and rejection of the claim, the performance at decedent's request of the services set forth in the claim, services performed in the management of a rooming house, and the reasonable value thereof.

The answer denied generally all the allegations of the complaint. It also set up the statute of limitations, that plaintiff had been paid for all services rendered, and that the complaint did not state facts sufficient to constitute a cause of action against defendants.

Plaintiff first went to work for decedent in July or August, 1930. At that time decedent owned and operated a rooming house, consisting of fifteen rooms, and a hamburger stand next door. Plaintiff's duties at that time consisted of cleaning the rooms, mopping floors, doing the laundry, making beds, handing out linen, cooking, and assisting decedent in the hamburger stand. The record does not disclose just when the meretricious relations between the parties commenced, but the relationship is conceded. As a result of the relationship two children were born. Thereafter plaintiff continued with the services she had been accustomed to performing. When the hamburger stand was subsequently converted into a liquor store she also assisted decedent in the store and waited on customers. There was testimony that the value of the services performed in the rooming house was $3 to $4 a day. In 1944, 1945 and 1946 plaintiff worked in a shirt factory in Monrovia, and there is testimony from which it may reasonably be inferred that she used her earnings for the benefit of decedent and made payments upon the home he had purchased in Monrovia. The evidence does not show the amount of her earnings in 1944. Her earnings in 1945 were $949.99, and in 1946 were $787.27.

The court found that plaintiff performed services for decedent between August 15, 1930, and July 31, 1946; that during decedent's lifetime he promised to reimburse plaintiff for her services at the time of his death and to make provision for her in his will; that he failed to do so; and that the reasonable value of the services was $3,000. The services which the court found were performed were those mentioned in the claim and in the complaint, to-wit, "keeping house for him during all of said time, cooking his meals from day to day, *living with him as man and wife during all of said time and bearing the said Charles Westbrook two children,* namely * * * managing and cooperating with the said Charles Westbrook in the management of a rooming house business and earned [earning] a salary from time to time during said period, all of which was turned over to the said Charles Westbrook or expended by the plaintiff in behalf of the said Charles Westbrook." (Italics added.) Judgment was rendered accordingly, from which this appeal was taken.

[2] When a man and woman knowingly live together in a meretricious relationship—in the absence of an express agreement, oral or written, that she be compensated for services performed—there is no implied obligation on the part of the man to compensate the woman for household services rendered by her. Lazzarevich v. Lazzarevich, 88 Cal.App.2d 708, 719, 200 P.2d 49 and cases cited therein; 35 Am.Jur. 219, sec. 55; 58 Am.Jur. 534, sec. 29; 71 C.J. 80, sec. 40; Anno. 29 L.R.A., N.S., 787; L.R.A.1917B 683; Ann.Cas.1916B 114; cf. Gjurich v. Fieg, 164 Cal. 429, 129 P. 464, Ann.Cas.1916B, 111. One reason for the rule is the illegality of the relationship where it enters into the alleged agreement. 71 C.J. 80, sec. 40. Another reason is the presumption of gratuity arising from the family relationship of the parties, which family relationship repels the implication of a promise to pay that would otherwise arise from the performance and acceptance of valuable services. 71 C.J. 80, sec. 40; cf. Gjurich v. Fieg, 164 Cal. 429, 129 P. 464, Ann.Cas.1916B, 111.

[3] Although the parties live together in illicit relationship during the time the services are performed, an express contract to compensate for services performed as a housekeeper has been held valid and enforceable unless made in contemplation of such illicit relationship. Emmerson v. Botkin, 26 Okl. 218, 109 P. 531, 29 L.R.A., N.S., 786, 138 Am.St.Rep. 953; Lytle v. Newell, 68 S.W. 118, 24 Ky.Law Rep. 188; Rhodes v. Stone, 63 Hun. 624, 17 N.Y.S. 561. Whether the contract was dependent upon the illicit relationship is a question of fact. Trutalli v. Meraviglia, 215 Cal. 698, 12 P.2d 430; Lytle v. Newell, 68 S.W. 118, 120, 24 Ky. Law Rep. 188.

[4] When a man and woman live together "under an agreement to pool their earnings and share equally in their joint accumulations, equity will protect the interests of each in such property. Bacon v. Bacon, 21 Cal.App.2d 540, 69 P.2d 884; Mitchell v. Fish, 97 Ark. 444, 134 S.W. 940, 36 L.R.A., N.S., 838; see Feig v. Bank of America etc. Ass'n, supra [5 Cal.2d 266, 54 P.2d 3]; Bracken v. Bracken, 52 S.D. 252, 256, 217 N.W. 192; Hayworth v. Williams, 102 Tex. 308, 116 S.W. 43, 132 Am.St.Rep. 879. Even in the absence of an express agreement to that effect, the woman would

be entitled to share in the property jointly accumulated, in the proportion that her funds contributed toward its acquisition. Hayworth v. Williams, supra; Delamour v. Roger, 7 La.Ann. 152." Vallera v. Vallera, 21 Cal.2d 681, 685, 134 P.2d 761, 763.

[5–7] There is sufficient evidence to support the finding that there was an express agreement on the part of decedent to compensate plaintiff for the services performed by her in maintenance of the household, in the rooming house, the hamburger stand, and the liquor store, at the termination thereof, towit, at decedent's death. The indisputable fact remains, nevertheless, that (1) the action is predicated upon a claim which seeks, among other things, the reasonable value of living with decedent in meretricious relationship and bearing him two children; (2) the complaint likewise includes these alleged services among the services for which plaintiff seeks recovery; and (3) the findings, upon which the judgment rests, include compensation for these same alleged services. The law does not award compensation for living with a man as a concubine and bearing him children. "Ex turpi contractu actio non oritur." "Aid will never be given by any court to a person who bases his cause of action or claim upon illegal or immoral acts or conduct." Ballerino v. Ballerino, 147 Cal. 544, 545, 82 P. 199, 200. The findings do not specify the reasonable value of the different items of services found to have been performed. The court merely found that all of the services alleged to have been performed, including living together and bearing children, were of the reasonable value of $3,000. In this state of the record it is impossible for us to say what part of the $3,000 was awarded for the alleged services for which recovery cannot be had. As the judgment is, at least in part, for the value of the claimed services for which recovery cannot be had, it must be reversed.

[8] The findings are also materially defective in that there is lumped in the "services" performed the item "earned [earning] a salary from time to time during said period, all of which was turned over to the said Charles Westbrook or expended by the plaintiff in behalf of the said Charles Westbrook." Obviously, this is not a "service" performed for which recovery can be had on that theory. There is no finding as to the amount of the salary earned by plaintiff and turned over to the deceased or expended in his behalf. Plaintiff's recovery, if any, depends upon proof of the actual amount contributed by her. This item should have been found separately from those included in services performed by plaintiff; and the exact amount contributed by her, in accordance with the proof, should have been found.

[9, 10] The action, insofar as it seeks recovery for services performed in maintaining the household, in the rooming house, the hamburger stand, and the liquor store, and insofar as it seeks recovery of moneys contributed, is not barred by the statute of limitations. In Lazzarevich v. Lazzarevich, 88 Cal.App.2d 708, at page 720, 200 P.2d 49, at page 56, we stated: "Where services are rendered over a period of time under an express or implied agreement that they shall be paid for at the termination thereof, the Statute of Limitations begins to run from the time the last service is rendered." In Lazzarevich we also held that where reimbursement for moneys contributed is to be made at date of death, the cause of action does not accrue until the date of death. There was evidence from which the court could have found that there was an express agreement, untainted by the illicit relationship, that these services were to be paid for at the termination thereof, and that plaintiff at decedent's death was to be reimbursed for moneys contributed.

[11, 12] The action should have been dismissed as to the estate of Charles Westbrook. An estate is not a person or entity and cannot be sued. In re Estate of Glass, 164 Cal. 765, 130 P. 868. The judgment, if for plaintiff, should provide that it be paid by the administrator in due course of administration of the estate of Charles Westbrook. Probate Code, sec. 730.

Reversed.

SHINN, P. J., and WOOD, J., concur.

95 Cal.App.2d 790

PEOPLE v. PETTIS.

Cr. 4410.

District Court of Appeal, Second District
Division 1, California.

Jan. 30, 1950.

John Bakewell Pettis was convicted in the Superior Court of Los Angeles County, Charles W. Fricke, J., of incest in that defendant had incestuous sexual intercourse with his daughter, and he appealed.

The District Court of Appeal, White, P. J., held that complaining witness was not at law an accomplice and that her testimony needed no corroboration to sustain conviction, and that the evidence sustained conviction.

Judgment affirmed.

1. Criminal law 🔑507(7)
Incest 🔑14

A female under the age of 18 years and over the age of 14 years was not at law an "accomplice" to incestuous sexual intercourse her father allegedly had with her, and conviction of father for incest could be sustained on her uncorroborated testimony. Pen.Code, §§ 26, subd. 1, 261, subd. 1, 285.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Accomplice".

2. Criminal law 🔑1159(3)

The general rule that appellate courts will not ordinarily disturb a verdict on ground of insufficiency of evidence when there is a conflict in evidence is subject to exception that when preponderance of evidence against verdict is so great as to produce a conviction that in rendering it jury must have been under influence of passion or prejudice, and appellate tribunal when so convinced, may, in the interest of justice, order a retrial.

3. Incest 🔑14

In prosecution for incest in that defendant had incestuous sexual intercourse with his daughter, testimony of daughter was not so "inherently incredible" as to be no evidence at all, and sustained conviction, where her testimony did not show that something seemingly impossible under the circumstances was done.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Inherently Incredible".

4. Criminal law 🔑1159(4)

A reviewing court cannot reject testimony of a witness that has been believed by the duly constituted triers of fact unless the falsity of such statements is apparent without resort to any inferences or deductions, and evidence cannot be branded as inherently improbable because it discloses circumstances that are unusual.

5. Criminal law 🔑1144(14)

On appeal from conviction for incest, where given instructions were not before Court of Appeal and no complaint was made that instructions were erroneous or unfair, court would assume that, if requested, appellant was afforded benefit of cautionary instruction to general effect that the charge was easily made and difficult to disprove, so that testimony of prosecuting witness should be examined by jury with caution.

6. Criminal law 🔑1159(2)

Incest conviction would not be reversed for insufficiency of the evidence where it did not clearly appear that upon no hypothesis whatever was there sufficient substantial evidence to support conviction.

Gladys Towles Root, Los Angeles, for appellant.

Fred N. Howser, Attorney General; Stanford D. Herlick, Deputy Attorney General, for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with the crime of incest in that he had incestuous sexual intercourse with his daughter. A prior conviction of the crime of Breaking and Entering, a felony, in the State of Iowa, for which he served a term of imprisonment in the State Prison was also charged against him.

Defendant entered his plea of not guilty and admitted the prior conviction. He also pleaded not guilty by reason of insanity, but the record does not disclose what disposition was made as to such last-mentioned plea.

The cause proceeded to trial before a jury on the issue raised by defendant's plea of not guilty, resulting in a verdict of guilty as charged in the information. Motion for a new trial was denied and judgment pronounced. From the judgment of conviction defendant prosecutes this appeal.

As ground for reversal appellant earnestly insists that the evidence is insufficient to sustain the judgment of conviction in that the complaining witness was an accomplice and that her testimony was not corroborated.

The factual background which gave rise to this prosecution may be thus epitomized:

The complaining witness testified that during the first part of April, 1949, she resided with her father, mother and two brothers, the later of whom were aged 9 and 10. That their residence consisted of a livingroom, kitchen, dining room and bedrooms, totaling 8 rooms in all. The complaining witness was 17 years of age at that time. In the early morning hours of April 3, 1949, after having been "out on a date" she returned home with her escort. Upon entering the house she was reprimanded by her father, the appellant, for coming home at such a late hour. An argument ensued concerning the hour at which she returned home. At this time, according to the complaining witness, the defendant was in the nude. The former then retired to her bedroom which she occupied alone. The other children had their own room, while the father shared a room across the hall with his wife, the mother of the complainant. After the latter was in bed, according to her testimony, her father entered her room and an act of sexual intercourse took place between him and his daughter. Following this appellant left the room.

According to the testimony of the complaining witness, acts of sexual intercourse had taken place between her and the appellant since she was 11 or 12 years old. She testified that she did not bring this state of affairs to anybody's attention because her father had told her not to tell anyone, and because she was afraid. She testified that although her father had never threatened her she was, nevertheless, afraid.

About two weeks following the foregoing act of April 3, the complainant and her mother went to the Georgia Street Juvenile Bureau of the Los Angeles Police Department where they made a complaint about the appellant. This complaint concerned his conduct with his daughter. At this time the latter told the authorities about her relations with her father. She had previously told her mother and sister about these relations prior to the time she accompanied her mother to the police station. She testified that her mother was the first person she told.

On cross-examination the complaining witness testified that before and during this act of sexual intercourse on April 3, she said nothing to her father, did not protest, did not "fight" him, but "just submitted to his advances". She did not remember whether her father said anything to her or not. She testified that she went on her "date" on April 3 with her father's permission. In her testimony she admitted that on the aforesaid night she was mad at her father and believed she probably was also mad at him on the following day, although she spoke to him. That she was not mad at her father, however, at the time of the trial.

The complaining witness testified to acts of sexual intercourse she had had with another man, although she did not recall upon how many occasions, testifying that it was quite a few times, "possibly ten". She was not married to this man. That she first had intercourse with him about a year and a half prior to the time of trial.

The same witness testified that she was receiving medical treatment for a condition involving her private parts. She was unable to state the exact nature of this condition, stating that it might be venereal disease or some glandular trouble. That a Mr. Martin or a Mr. Meyers was providing some of the money for these medical treatments.

The complaining witness testified that she could not remember the exact number of times her father had had intercourse with her but stated it usually occurred when he was drinking, and that he usually had sexual intercourse with her on occasions when he was drinking.

Margaret Pettis, the mother of the complaining witness and the wife of the appellant, testified that she took her daughter to the authorities to make a report concerning her husband on April 19. That the main reason for such a complaint was the drunken behaviour of the father.

Mrs. Pettis testified that on the night here in question she had retired with her husband, that she was asleep when her daughter came in and did not hear any conversation or argument between her husband and daughter. That she did not know whether her husband "got up or stayed in bed".

The appellant testified in his own behalf that he was a playground director and was the father of the complaining witness. He recalled the argument of April 3 at about one or two o'clock in the morning. He stated the reason for the argument was that his daughter had come in later than he had given her permission to remain out. That he was in bed when the complaining witness and her escort returned and that he stayed in bed. He testified that the doors were all open in the house and that he told the man who escorted her home "what he thought of him for taking a young girl her age * * *". That he did not see the man. The father testified that his daughter went to bed and he turned over and went to sleep. That he was sleeping with his wife at the time. He denied having an act of sexual intercourse as charged in the information, and also denied having acts of intercourse with his daughter at any time or that he ever attempted to have such relations with her. Appellant denied on cross-examination that he was a heavy drinker of intoxicating liquors. While admitting that he drank intoxicating liquor on occasions, he denied that he ever drank to excess.

[1] Appellant's first and main contention is that the alleged victim was an accomplice and that, therefore, her testimony must be corroborated. We are persuaded that the complaining witness being under the age of consent (Penal Code section 261, subd. 1) she was not at law an accomplice. It therefore follows that her testimony alone was legally sufficient to sustain the conviction of the act charged. The incestuous act referred to is an act of sexual intercourse. Under the code section above cited, an unmarried female under the age of 18 years is incapable of giving legal assent to such an act. Appellant earnestly insists that since, under subdivision 1 of section 26 of the Penal Code all those over 14 years of age are capable of committing crime, and that under section 285 no exception is made of children over the age of 14 years, it follows that a girl under 18 and over 14 years of age who commits fornication with a person within the degrees of consanguinity within which marriage is declared by law to be incestuous, is guilty of incest, and therefore, would be an accomplice in a case wherein the other party to the act was a defendant. This contention is answered adversely to appellant in the case of People v. Stoll, 84 Cal.App. 99, 102, 257 P. 583, 584, wherein the court says: "This argument overlooks the fact * * * that under our statutes, being under the age of legal consent to such an act, regardless of her actual assent thereto, she can not be said as a matter of law to have willfully and willingly joined in the intercourse" see also People v. Hamilton, 88 Cal.App.2d 398, 401, 198 P.2d 907. In the instant case the complaining witness was 17 years of age at the time of the commission of the offense charged. Not being an accomplice, her testimony was not required to be corroborated.

[2-4] Finally, appellant asserts that should it be held that the testimony of the complaining witness, if capable of belief, is alone sufficient to support the verdict, that her testimony, when considered in the light of the circumstances surrounding the commission of the offense charged, must be held by this court to be so inherently incredible as to be no evidence at all. It is true that the general rule that appellate

courts will not ordinarily disturb a verdict on the ground of insufficiency of the evidence when there is a conflict in the evidence is subject to the exception that when the preponderance of evidence against the verdict is so great as to produce a conviction that in rendering it the jury must have been under the influence of passion or prejudice, an appellate tribunal when so convinced may in the interests of justice, order a retrial. It may readily be regarded as unusual conduct on the part of any sensible person to so act as the complaining witness testified the appellant did and acted under the circumstances hereinbefore narrated. Yet we can not see how it could be held by an appellate court that the testimony itself disclosing such conduct, is not true or is improbable upon its face. True, the testimony of the complaining witness revealed a shocking and unusual state of affairs, but before we are authorized to stricture such testimony as not true, inherently improbable upon its face, or unbelievable *per se,* it must appear that something has been done that it would not seem possible could be done under the circumstances described. A reviewing court is not authorized to reject testimony of a witness that has been believed by the duly constituted triers of fact unless the falsity of such statements be apparent without resort to inferences or deductions. Because evidence discloses circumstances that are unusual it can not be branded as inherently improbable. People v. Haydon, 18 Cal. App. 543, 555, 556, 123 P. 1102, 1114; People v. Klinkenberg, 90 Cal.App.2d 608, 204 P.2d 47, 613.

[5] The instructions given to the jury were not brought here on this appeal and no complaint is made that they were erroneous or unfair. We must therefore, assume that appellant was afforded the benefit of a cautionary instruction, if requested, to the general effect that a charge such as the one here in question is easily made and difficult to disprove, for which reason the testimony of the prosecuting witness should be examined by the jury with caution. People v. Putnam, 20 Cal.2d 885, 889, 129 P.2d 367.

[6] Being unable to say in the case now engaging our attention that it is made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below, we are powerless to set aside, on the ground of insufficiency of the evidence, the verdict of the jury. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

For the foregoing reasons, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

95 Cal.App.2d 703

PEOPLE v. RICHARDSON

Cr. 2628.

District Court of Appeal, First District,
Division 1, California.
Jan. 26, 1950.

David Richardson was convicted of second-degree robbery and of a prior conviction by the Superior Court in and for the City and County of San Francisco, Edward P. Murphy, J., and the defendant appealed.

The District Court of Appeal, Bray, J., held that evidence supported conviction, that defendant's prior conviction was binding upon him notwithstanding his minority at time thereof, that matters outside the record could not be considered on appeal, and that defendant was not deprived of his constitutional right to be represented by counsel at trial.

Judgment affirmed.

1. Robbery 🔑24(1)

Evidence was sufficient to support conviction of second-degree robbery. Pen. Code, § 211.

2. Criminal law 🔑1159(4)

The veracity of witnesses was a matter for jury to determine, rather than appellate court.

3. Criminal law ⚷1202(1)

Defendant's conviction in Ohio of crime of burglary and his imprisonment therefor in Ohio State Penitentiary constituted a "prior felony conviction and servitude," as basis for increased punishment under Habitual Criminal Statute.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Prior Felony Conviction".

4. Criminal law ⚷1039, 1064(8)

Where matters relating to alleged jury misconduct were not offered at trial or on motion for new trial, such matters, even if admissible, could not be considered on appeal.

5. Criminal law ⚷1166½(1)

Defendant was not entitled to reversal of conviction on ground that he was not represented by counsel at trial, where defendant was represented by counsel of his choosing up to date when cause was first to be tried when court permitted counsel to withdraw and made order that defendant represent himself in propria persona pursuant to defendant's request, and appointed a deputy public offender to assist defendant.

6. Criminal law ⚷1128(4)

Defendant could not on appeal from conviction offer testimony of codefendant, who, in affidavit accompanying defendant's closing brief, set up matters directly contradicting his testimony at the trial, which matters, if true, would completely exonerate defendant and show that crime was committed by codefendant and a named other person.

◆

David Richardson, in propria persona, for appellant.

Fred N. Howser, Attorney General, Clarence A. Linn, Deputy Attorney General, for respondent.

BRAY, Justice.

Defendant and one Stocker were tried on, and convicted by a jury of, the charge of violation of section 211 of the Penal Code (robbery). Three prior convictions were admitted by Stocker. Two prior convictions were charged against defendant, which he denied. One of these was dismissed. The jury found that defendant had suffered the other conviction. From the judgment entered on the jury verdict (the court fixed the degree as second) defendant appealed. Stocker did not appeal.

Grounds of Appeal.

Defendant appears in propria persona and it is difficult to determine exactly the points he desired to raise. Apparently his grounds of appeal are: (1) alleged insufficiency of the evidence; (2) prior conviction claimed not binding upon him because of minority; (3) claimed matters outside the record prove his innocence; (4) he was not represented by counsel at trial.

1. Evidence Sufficient.

[1, 2] Primarily, defendant contends the evidence against him was perjured, contradictory, mistaken and untrue. We have carefully examined the transcript of the evidence. It fully and completely supports the conviction. Obviously, the veracity of the witnesses was a matter for the jury to determine, rather than this court.

The evidence for the prosecution was as follows: On the evening of June 15, 1949, at about 9:15, Edward Hanson, a clerical employee of the Union Oil Company, 425 Front Street, and a resident of Menlo Park, left the office of his employer to walk to the Third and Townsend Depot of the Southern Pacific Railroad to catch the 9:45 p. m. train. As he passed the entrance to a hotel at 574 Third Street (between Bryant and Brannan, on the west side of Third) he saw Stocker, who grabbed him by the arm and forced him into the doorway of the hotel. There he encountered defendant, who grabbed him, removed his watch, and, with Stocker, pulled him into the hallway of the hotel. While Stocker held him defendant struck him and caused him to fall to the floor. Defendant then went through Hanson's pockets, took his wallet and two $1 bills. The wallet contained no money, but did contain various identification cards, receipts, and a pay voucher for $670.60, payable to

Hanson. They then released Hanson who ran into the street, while defendant and Stocker went up the stairs of the hotel, through the hallway, and a rear exit.

Special Officer Scott appeared, in uniform, and Hanson reported what had happened. Scott told Hanson to stay in front of the building and went into the building toward the rear. When Scott was in the hotel he heard the rear door close. Following the sound, he went out the rear door onto Ritch Street (west of Third, running parallel to it). As he did so he observed two men (Stocker and defendant) going on a "dog trot" down Ritch toward Bryant. They stopped near Bryant, adjacent to a vacant lot on which some shrubbery was growing. Scott observed the two men going through some papers which they threw over a small fence into the vacant lot and on top of a bush. He made himself known to them, and placed them under arrest. As he did so, defendant threw two crumpled pieces of paper to the ground. Scott searched them briefly, to see that they were not carrying weapons, handcuffed them to each other, and took them back to Hanson. Hanson promptly identified them as the two who had attacked him. He again identified them at the trial.

Scott had Hanson go to Third and Townsend to get Officer Gale, and Scott, from the police box, called for a radio car. The attackers were taken away in the radio car and Scott, Gale and Hanson made a further search of the area in which the defendants had been arrested. More papers were found and among them two crumpled $1 bills were found at the exact spot where the defendant was seen by Scott to drop two pieces of paper. They also found a driver's license, a commutation ticket, and the $670.60 voucher payable to Hanson, all of which Hanson identified as having been in his wallet. The watch and wallet were never found.

The only evidence for the defense was the testimony of Stocker and Richardson, both of whom denied robbing Hanson and that either had been in front of the hotel at 574 Third Street before the robbery. Both claimed that they met at the corner of Bryant and Ritch Street where Stocker asked Richardson for a cigarette, and at that moment Officer Scott arrived. They denied that either threw away the money or the papers. Stocker's testimony was impeached by his admission of priors, and that of defendant by proof of a prior. The jury clearly and properly disbelieved their testimony.

Alleged discrepancies in the testimony of Officer Scott at the preliminary examination and at the trial, the fact that the watch and the wallet were not found, and other matters set forth in defendant's briefs, at best go only to the weight of the evidence and were matters for the jury, and not this court, to determine.

2. Minority Does Not Affect Prior Conviction.

[3] It is not clear whether defendant raises this point as a ground of appeal. In his opening brief he states that the attorney who represented him at the preliminary examination told him that because he was under 21 years of age at the time, his conviction in Ohio in 1938 of the crime of burglary and his imprisonment therefor in the Ohio State Penitentiary did not constitute a prior. It was not a juvenile court proceeding. In spite of his youth, such conviction and incarceration constitutes prior felony conviction and servitude. In re Gilliam, 26 Cal.2d 860, 161 P.2d 793; People v. Stein, 31 Cal.2d 630, 191 P.2d 409.

3. Matters Outside the Record.

[4] Defendant has made statements concerning matters outside the record and of which there is no proof. He makes the broad statement that one of the jurors was intoxicated; that at least half the jury were "prejudiced against" him by an unnamed officer of the law; that the "Sheriff of the County Jail" advised him to "cop out" and he would see that defendant got only a couple of months in the county jail, otherwise he would see to it personally that defendant got the maximum. Defendant also claims that "Stocker * * * admitted to me under pressure that he had hidden in the farther end of the alley after the felony, and when I happened along

a few seconds later, that is when he stepped out and asked me for a cigarette." There is no record of any of these matters. They were not offered at the trial nor on the motion for new trial (assuming they were all relevant and admissible). They cannot be considered on appeal. People v. Kabakoff, 45 Cal.App.2d 170, 113 P.2d 760.

4. Counsel at Trial.

[5, 6] Again it is not clear whether defendant is urging as a ground of appeal his claimed lack of counsel at the trial. His only reference to this is in his opening brief, where he states, "I was put at a disadvantage by the court, and having no one to defend my rights as a citizen of the United States." He does not explain his reference to the court and our examination of the transcript fails to disclose any improper action. Actually, the court leaned backwards to be fair. An instance of this occurred when the court appointed a deputy public defender to assist defendant at the trial. Defendant was represented by counsel of his own choosing up to the day when the cause was first to be tried. On that day counsel requested permission of the court to withdraw and defendant expressed to the court his desire to represent himself in propria persona. The court permitted the counsel to withdraw and made an order that defendant represent himself. The case was then continued approximately six days for trial. At the very beginning of the trial the court, without request, appointed a deputy public defender "to counsel with * * * [defendant] if he so desires in order that every right which he has as an American citizen and as a defendant is fully accorded. If he chooses to avail himself of that, he can do so; if he doesn't, that is, of course, his right. At any rate, I want the record to show the Court, in the exercise of its discretion, is appointing counsel for him, and I might say able and experienced counsel which he may avail himself if he chooses." The record shows that the deputy public defender so appointed assisted defendant in examining witnesses and in objecting to the introduction of evidence. In nowise was defendant deprived of counsel and in nowise can defendant truthfully say that he had no one to defend his rights as a citizen of the United States. See People v. Northcott, 209 Cal. 639, 289 P. 634, 70 A.L.R. 806. It is evident from his closing brief that defendant believes that on appeal he has the right to appear and testify further in the matter and to offer the testimony of Stocker, who in an affidavit accompanying defendant's closing brief, sets up matters directly contradicting Stocker's testimony at the trial, which matters, if true, completely exonerate defendant, and show that the crime was committed by Stocker and a named other person. There is no method by which, on this appeal, the further testimony of plaintiff can be taken nor the Stocker affidavit considered.

The judgment and order denying new trial are affirmed.

PETERS, P. J., and WARD, J., concur.

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95 Cal.App.2d 740

GAYTAN ENGINEERING CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 17344.

District Court of Appeal, Second District
Division 3, California.
Jan. 26, 1950.

Proceeding by the Gaytan Engineering Company, a corporation, California Compensation Insurance Company, a corporation, and Arthur Gaytan against the Industrial Accident Commission of the State of California and Esther Rush and others to review an order of the Industrial Accident Commission awarding compensation for the death of S. W. Rush, an employee, whose death occurred as a result of an automobile accident.

The District Court of Appeal, Shinn, P. J., held that evidence sustained the commission's finding that the employee suffered fatal injuries in the course of his employment while transferring from one job to another at employer's direction.

Award affirmed.

1. Administrative law and procedure ⚷486
Workmen's compensation ⚷1762

District Court of Appeal will read into general findings of compensation commission specific findings on all factual issues that tend to support award and which have substantial support in evidence.

2. Workmen's compensation ⚷1578

In compensation proceeding, evidence sustained commission's finding that employee, killed in automobile accident while transferring from one job to another while driving his own truck in compliance with employer's directions, received fatal injuries in the course of and arising out of his employment.

◆

Kearney, McCartney, Scott & Clopton, Los Angeles, for petitioners.

T. Groezinger, San Francisco, for respondents.

SHINN, Presiding Justice.

Proceeding to review an award of a death benefit and burial expenses to the widow and minor children of S. W. Rush, whose death occurred on July 22, 1948, as a result of an automobile accident. The question for decision is whether the commission correctly decided that deceased sustained injury arising out of and occurring in the course of his employment which proximately resulted in his death.

Mr. Rush was employed by Gaytan Engineering Company as a painter, and was sent from Los Angeles to the Army Air Base at Muroc, California. He provided his own transportation to the job by means of his pick-up truck. While he was employed on the job he was compensated for the use of his truck in the employer's business around the Air Base. His services at the air field were discontinued the evening of July 21, 1948 under circumstances to be related. At about 9:30 p. m. he drove his truck north from the Air Base to U. S. Highway 466, proceeded west on that highway, and shortly thereafter suffered the fatal accident. Gaytan Engineering Company also had a painting contract with the Navy at Inyokern. The Muroc job was in charge of a foreman, Kenrey, and the Inyokern job in charge of a foreman, Velasco, both employees of the Gaytan Company. The disputed factual question was whether deceased was returning home to Los Angeles after the termination of his employment, or was on his way to Inyokern under the direction of Kenrey to continue his employment there.

[1] We should read into the general findings of the commission specific findings upon all factual issues that tend to support the award and which have substantial support in the evidence. It will therefore be deemed that the commission found that Rush was on his way to Inyokern pursuant to instructions of his employer. There was no direct evidence that he was on his way to Inyokern at the time he met with his accident. He had some 80 or 90 miles to travel and was on the route of the main highways between Muroc and Inyokern although he could have reached Los Angeles by turning south instead of north at Mojave. There were considerably shorter routes he could have followed in going directly from Muroc to Los Angeles.

The foreman Kenrey testified that in the afternoon of July 21st he had been directed by Mr. Gaytan, president of the employing corporation, to transfer 10 men from Muroc to the Inyokern job and that this practice had been followed on previous occasions. He also testified that on July 21st additional painters were needed at Inyokern and could be spared from the Muroc job; that on the afternoon of the 21st he directed Rush and several other painters to go to Inyokern and that Rush agreed to go and also inquired as to whether he would be paid for the use of his truck at Inyokern. There was other testimony that Kenrey directed Rush to go to Inyokern and also testimony that when he left Muroc at about 9:30 p. m. he stated he was going to Inyokern. Petitioner contends that all probative force of Kenrey's testimony was destroyed by contradictory testimony and other impeaching evidence. Although petitioner's argument is not without force it is unnecessary to discuss it. The testimony to which we have referred was sufficient as proof of the facts to which Kenrey testified; the question of his credibility is not one of law. We must therefore take as a factual basis for discussion of other questions that Rush at the time of his accident was on his way to Inyokern under an agreement with his employer that he would go there to work on the Navy job.

At the time Rush was employed it was agreed that he would be paid wages for the time spent in going from Los Angeles to the Muroc job, and in returning to his home after his services were ended. It was also an established custom to pay employees for time spent in going from Muroc to the Inyokern job when they were transferred. It is clear, in any event, that the transfers were made in the interests and at the expense of the company and not at the expense of the employees. In the case of Mr. Rush there was the added circumstance that the company might have use for his truck in the Inyokern job as it had been used on the Muroc job.

[2] We entertain no doubt that in the circumstances related the commission was justified in finding that the fatal injuries occurred in the course of and arose out of the employment. The evidence, in our opinion, justifies the conclusion that there was no break in the continuity of Rush's services. Muroc and Inyokern are small desert communities far removed from any sizable labor market. The transfer of men from one job to the other was of a special benefit to the employer. In going to Inyokern Rush had not departed from the service of his employer nor engaged upon an errand personal to himself. It was, of course, to his advantage to continue his employment, but only as it is to the advantage of any workman to earn his wages. He was serving his employer as long as he was obeying special directions given by the latter, especially since the directions were such as were reasonably to be anticipated, within the scope of the employment.

While the precise question before us has not been decided directly in California, the cases recognize that transfer from one job to another may be made without a termination of the employee's services. Truck Insurance Exchange v. Industrial Accident Comm., 27 Cal.2d 813, 819, 167 P.2d 705; Jimeson v. Industrial Accident Comm., 23 Cal.App.2d 634, 73 P.2d 1238; Gagnebin v. Industrial Accident Comm., 140 Cal.App. 80, 34 P.2d 1052; Dept. of Public Works of California Division of Highways v. Industrial Accident Comm., 128 Cal.App. 128, 16 P.2d 777. It has been settled however, in other jurisdictions, that under such circumstances the services will be deemed to have been continuous if the evidence shows that the parties acted with that understanding. Hardie Sales Co. v. Astrachan, 239 Ala. 558, 196 So. 135; Industrial Commission of Colorado v. Aetna Life Insurance Co., 644 Colo. 480, 174 P. 589, 3 A.L.R. 1336; Wineland v. Taylor, 59 Idaho 401, 83 P.2d 988; McKinney v. Dorlac, 48 N.M. 149, 146 P.2d 867; Raimone v. Fligelman, 245 App.Div. 780, 280 N.Y.S. 928; Texas Employers' Ins. Ass'n v. Herron, Tex.Civ.App., 29 S.W.2d 524; Burchfield v. Department of Labor and Industries, 165 Wash. 106, 4 P.2d 858; see also Campbell on Workmen's Compensation, Vol. 1, sec. 181, p. 170. In the present case the payment of compensation to the employee during the time spent in transferring from Muroc to Inyokern was a circumstance tending in some degree to show there was an understanding that he would remain in the service of his employer while making that journey. There was ample evidence to prove that Mr. Rush had not discontinued his services for his employer at the time of the accident.

In view of the conclusions we have stated it is immaterial that Mr. Rush was using his own means of transportation, as he was expected to do. He is not to be considered as an employee who was going to work or returning from it, but as one who, having engaged in the work for which he was employed, was carrying out special instructions of his employer in the performance of the agreed services. It is also immaterial that he was making the trip after usual working hours. Nighttime travel across the desert in the month of July is not unusual, and Mr. Rush had received no instructions as to when he should leave Muroc.

The award is affirmed.

WOOD and VALLÉE, JJ., concur.

95 Cal.App.2d 619

THOMPSON et ux. v. SWIRYN et ux.

Civ. 4106.

District Court of Appeal, Fourth District, California.

Jan. 18, 1950.

Rehearing Denied Feb. 10, 1950.

Hearing Denied March 16, 1950.

J. R. Thompson and W. S. Thompson, husband and wife, sued J. H. Swiryn and Shirley Swiryn, husband and wife, in unlawful detainer for forfeiture of lease of hotel and for treble rent. Defendants counterclaimed.

The Superior Court of Riverside County, Roberta Butzbach, judge assigned, rendered judgment on jury verdict for defendants on plaintiffs' complaint and for defendants on their counterclaim and plaintiffs appealed.

The District Court of Appeal, Griffin, Acting P. J., held, inter alia, that a deposit made by defendants when lease was executed was merely security for performance of lease by defendants and that defendants were entitled to recover balance of deposit upon breach after plaintiff assignees of lease recovered damages from the fund for breach.

Judgment affirmed.

1. Landlord and tenant 🔑213(5)

Where money is paid upon execution of a lease as an advance payment of rent, the landlord can retain the money on default of tenant.

2. Landlord and tenant 🔑34(1)

Where money is paid upon execution of a lease as a bonus for consideration for execution of lease, tenant cannot recover the money when lease is cancelled through fault of tenant.

3. Landlord and tenant 🔑184(2)

When money is deposited merely as security for the performance of covenants by tenant, without a penalty for forfeiture clause, payment is valid to that extent and tenant is not entitled to a return of deposit upon breach of lease, but landlord may look to deposit for damages proved and tenant may recover the balance.

4. Evidence 🔑450(4)

Provision of lease that if rented hotel was destroyed or damaged by fire and tenant had not defaulted, landlord could repair or rebuild, and that at option of landlord, landlord should be relieved of obligation to repair or rebuild and could terminate lease by payment to tenant of money deposited by tenant if fire occurred prior to specified date, less money due landlord up to date of fire, created an ambiguity as to purpose of deposit notwithstanding provision that hotel was rented in consideration of payment of deposit, so as to permit introduction of evidence aliunde that deposit was security for performance of lease by tenant.

5. Landlord and tenant 🔑184(2)

Evidence justified judgment for tenant of hotel on ground that money deposited by tenant upon execution of lease was intended as security for performance by tenant, entitling tenant to recover balance of deposit upon breach by tenant after landlord recovered damages from deposit for breach, and on ground that deposit was not given in consideration of lease so as to entitle landlord to retain deposit.

6. Appeal and error 🔑932(1)

Where tenant upon breach of lease of hotel was entitled to recover all of a deposit made by him upon execution of lease, except for damages suffered by landlord for breach, Supreme Court in support of judgment not allowing landlord credit for inventoried items which were in the hotel when tenant took possession, would assume that tenant left an equal amount of stock in hotel when tenant left, or that a paid bill of sale should have been delivered covering the stock.

7. Landlord and tenant ⚷184(2)

Evidence justified jury in awarding landlord the difference between stipulated rent due landlord when tenant breached lease, and amount of deposit tenant made to secure faithful performance when lease of hotel was executed, as against contention that rent for the first month was included in deposit and that landlord should have credit for that amount.

8. Estoppel ⚷92(1)

Generally a voluntary acceptance of benefit of a transaction is equivalent to a consent to all obligations arising from it so far as the facts are known, or ought to have been known, to the person accepting, and he who takes the benefit must bear the burden. Civ.Code, §§ 1589, 3521.

9. Landlord and tenant ⚷53(2), 184(2)

Where landlord rented hotel and defendant and landlord entered into supplemental agreement permitting landlord to sell hotel subject to lease, and landlord assigned lease to plaintiffs, and plaintiffs and defendant entered into supplemental agreement modifying lease and settling rent dispute, and cancelling prior supplemental agreement, privity of contract existed between plaintiffs and defendant with respect to a deposit made by tenant when lease was executed to secure performance of lease, and tenant upon breach could recover from plaintiffs the deposit less damages suffered by plaintiffs from breach. Civ.Code, §§ 1589, 3521.

Ernest W. Pitney, Leland S. Davis, Los Angeles, for appellants.

Wing, Wing & Brown, Banning, for respondents.

GRIFFIN, Acting Presiding Justice.

This is an appeal by plaintiffs from a judgment on a verdict of a jury in favor of the defendants on their complaint, and for the defendants on their counterclaim in the sum of $2800.

This action is one for unlawful detainer and for forfeiture of the lease under which the defendants occupied the Beaumont Inn in Riverside County. In April, 1945, E. Tharalson, a real estate broker, owned the Inn. He was endeavoring to lease it. Tharalson had purchased that hotel in February of the same year and had previously borrowed money on it, secured by a trust deed on the property and a mortgage on the hotel equipment from the plaintiffs in this action. The plaintiffs and Tharalson had known each other for several years. Tharalson had represented plaintiffs professionally on prior occasions. In April, defendants contacted Tharalson, through one of his brokers with whom he had listed the property, and they had some oral agreement as to the terms of purchase and prepared a lease on a standard form. This lease was taken by them to an attorney who had represented Tharalson for many years and who also had been plaintiffs' attorney for several years. That attorney was dissatisfied with the form of the lease as drawn. He prepared a rough draft of a proposed lease which was given to defendants. They consulted their lawyer about it. After consultation between the attorneys Tharalson's attorney prepared the lease which is the subject of this action. It provides in part, that the lessor, in consideration of the sum of $9,000, leases to the lessee the Inn, together with the furniture and furnishings therein. The term of the lease runs for ten years commencing May 1, 1945, and ending April 30, 1955. Under paragraph 3, the lessee agrees to pay as rent the total sum of $99,001.00 for the full term aforesaid, payable in installments of $900 per month for the first ensuing 110 months of said term and the sum of $1.00 per month for the next ten months thereof. Then in parenthesis is the following clause: "The sum of Nine Thousand Dollars ($9,000.00) paid upon the execution of this instrument is not part of the rental above provided." The nature of this $9,000.00 deposit is the main issue in this action. The lease then provides that the first month's installment shall be paid on the signing of the lease. Then follows in paragraph 22 a provision that if, during the term of the lease, the premises shall be destroyed or damaged by fire, then, providing lessee shall not have defaulted in any of the provisions thereof, lessor, or his assigns shall proceed to repair or rebuild the premises, and then provides, however, that at the option of the lessor or his assigns he shall be relieved of any obligation to repair or rebuild the same "and be entitled to terminate this lease by the payment to lessee of the sum of Nine Thousand Dollars ($9,000.00), if said disaster shall occur prior to July 1, 1954, (less any moneys, if any, as shall then be due or shall have accrued to the lessor to the date of such disaster), but if such disaster shall occur after July 1, 1954, then by the payment to the lessee of an aggregate sum which shall be an amount equal to a sum computed on the then unexpired term hereof at the rate of Nine Hundred Dollars ($900.00) per month (thirty days) less any moneys then due or accrued to lessor." It is conceded that only the sum of $6,000 was actually paid by the lessee to the lessor and that the total sum of $9,000 mentioned in the lease was not actually paid.

On May 1, 1945, a supplemental agreement was entered into between the same parties agreeing that the lessor may sell the demised premises subject to the lease and reserving the right to show it to prospective purchasers. Lessor further agreed that during the term of the lease and prior to July 1, 1954, if the lessee should be precluded from using and operating pinball and slot machines then in use on the premises and lessee should suffer any reduction of revenue, then the monthly rental provided to be paid under the lease during any such period would be reduced during that period to the extent of one-half of the previous monthly average of revenue therefrom, not to exceed $200.00 It appears that on May 1, 1945, defendants went into possession of the demised premises; that on May 4, Tharalson assigned the lease to the plaintiffs in this action and plaintiffs became the owners of the hotel by grant deed dated the same day, and also obtained a bill of sale for furniture, furnishings and fixtures.

On January 1, 1947, plaintiffs entered into another supplemental agreement with defendants, because of certain disputes arising between them as to the amount of rentals theretofore accrued and owing, with respect to certain fixtures in the cafe that had been removed for the purpose of replacing them with new fixtures. Accordingly, the lease was modified to the satisfaction of the parties in reference to the fixtures and it was agreed on account of the rentals that had accrued under the lease, as modified by the supplemental agreements, the defendants would pay plaintiffs $300.00 in cash as a settlement on account of rent due for the period ending December 1, 1946. They further agreed that the supplemental agreement executed on May 1, 1945, would be canceled as of that date and in lieu thereof they agreed that the rental of $900.00 per month provided in the original lease should be reduced to $800.00 per month from January 1, 1947, during the time the agreement was in effect or until the lessee "shall acquire a license for the sale of spirited liquors." The amendments to the original lease or supplement agreements are not in question.

After taking possession, defendants installed furnishings and fixtures of the approximate value of $6,000.00. During the late fall of 1947, they found themselves in financial difficulties and unable to meet the payments due. They endeavored, unsuccessfully, to have the rental reduced to a figure that would enable them to operate the hotel, and advised plaintiffs that unless the rental were reduced plaintiffs could take the hotel back, as they could not continue, financially. In the early part of 1948, plaintiffs were endeavoring to sell the hotel and they desired to have defendants remain as it would facilitate a sale. Defendants paid the rent for the month of January, 1948, but paid none thereafter, and cooperated with plaintiffs in showing the hotel to prospective buyers. In April, 1948, unknown to defendants, plaintiffs entered into a written contract to sell the hotel. During that month, there were numerous conferences between the defendants, plaintiffs and others in an endeavor to settle their respective rights. Defendants claim that it was then, for the first time, that plaintiffs refused to credit them with the agreed deposit of $6,000.00 actually paid, and that accordingly plaintiffs refused to pay to defendants the difference between the deposit and the rental due. It was stipulated at the trial that the rental due at the time the action was brought was $3200.00.

During these final conferences the question arose as to the amount that should be paid to defendants for the furniture and furnishings installed by them, which the new buyers desired to purchase. No agreement was reached. Plaintiffs immediately filed this action in unlawful detainer for forfeiture of the lease and for treble rents. They set forth the lease and its several amendments, demanded possession, claimed a balance of $3300 rent due and owing from January 1, 1948, to June 1, 1948, demanded delivery of possession of the premises, including the furniture and furnishings contained therein, declared a forfeiture of the lease and agreements under which the defendants held possession, and in addition sought reasonable attorney's fees, as provided in the lease, in enforcing the covenants of the agreement in the sum of $750.00.

Defendants answered, admitted many of the allegations contained in the complaint and denied others, alleged that they did not hold possession of the premises since they had theretofore surrendered possession of the property and of the personal property situated therein to the plaintiffs; alleged that they never refused to surrender possession of the premises and that ever since January 1, 1948, they were willing to surrender possession upon the request of the plaintiffs and so informed them on numerous occasions, and that plaintiffs wanted defendants to remain in possession for the reason that the plaintiffs were endeavoring to sell the property by reason of the fact that such retention would make the property more salable if occupied by them. By way of counterclaim they set up the provisions of the lease in reference to the $9,000.00 retained by the lessor and claimed that it was understood by all the parties to the original lease and by the plaintiffs that such deposit was for the faithful performance of the lease by these defendants and that it appears for the lease itself and the evidence surrounding its making that the deposit was made only for the purpose of securing performance of the terms of the lease. By the counterclaim defendants seek the return of $9,000.00 less the accrued rental due under the lease.

The case went to trial upon the issues thus framed. Strenuous objection was made by plaintiffs to the admission in evidence of the testimony of the several parties surrounding the making of the original lease in respect to the purpose for which the $6,000.00 was paid to the original lessor. The trial court overruled the objection and admitted the testimony. It is the ruling on this objection that plaintiffs contend is in error. Several cases are cited in support of the objection, such as Brant v. California Dairies, Inc., 4 Cal.2d 128, 48 P.2d 13; Watson v. Fisher, 79 Cal.App. 621, 250 P. 577; Carr v. King, 24 Cal.App. 713, 142 P. 131. The jury returned a verdict, finding for the defendants on the complaint of plaintiffs and found that defendants were entitled to recover nothing on their counterclaim. Before the verdict was received and recorded, counsel for defendants moved to "make the verdict formal and regular" because, as he stated: "It appears to me that the verdict, found as it is, would have to find something in behalf of the counterclaim." After some argument the court ordered the jury to "reconvene and reconsider their verdict" and by stipulation the court gave the following instruction:

"You are instructed that you must find:

"Whether the disputed amount was given as a consideration for the execution of the lease, or as a deposit for performance.

"If you find that it was a deposit, you must then find the amount. If you find that the amount paid on the lease, whether it be in the sum of $9,000 or $6,000, was paid as a deposit, then you shall subtract from the $9,000 or the $6,000, the amount of rent in the sum of $3200, from the amount so found, and any further sums you may find the parties intended to be deducted therefrom.

"When you have so determined * * * you shall return with a verdict in a sum which is the difference, whether it be in favor of one party or the other. If you find that the sum paid on the lease was paid as a consideration or bonus for its execution, then you shall find for the plaintiff and against the defendant in the amount of $3200 for rent; and shall you find that the suit was necessarily instituted by plaintiffs, then you shall in addition find the sum of $750 due as attorneys' fees from defendants to plaintiffs."

The jury retired for the second time and returned with a verdict in favor of defendants on the complaint of plaintiffs and for the defendants on their counterclaim, in the sum of $2800.00. After polling the jury the verdict was recorded as read. Plaintiffs moved for judgment notwithstanding the verdict which was argued and denied.

The main argument here is that the court erred in admitting evidence, over objection, surrounding the facts and circumstances bearing upon the interpretation of the original lease, pertaining to the payment of the $6,000.00, and the $9,000.00 provision in the original lease.

The second argument is that there is no evidence to sustain a verdict for $2800 on the counterclaim. The next is that the evidence is without conflict that $900.00 of the $6,000.00 paid was immediately applied to the first month's rent; that the evidence is without conflict that the defendants received $1978.78 worth of merchandise and stock in trade, for which nothing further was paid and for which they were not allowed credit by the verdict. It was then contended, as a matter of law, that by the very terms of the lease, it should be held that the payment of the $6,000.00 was a payment in consideration of the execution of the lease and that that amount belonged to the landlord and that under the terms of the lease plaintiffs were entitled, without any offset, to $3200.00 plus $750.00 reasonable attorneys' fees, citing Wood v. Hipwell, 107 Cal.App. 680, 209 P. 1040; Ramish v. Workman, 33 Cal.App. 19, 164 P. 26; Weinreich v. Vernon, 109 Cal.App. 60, 292 P. 651; Curtis v. Arnold, 43 Cal.App. 97, 184 P. 510, and Staub Shoe Co. v. Byrne, 169 Cal. 122, 145 P. 1032.

[1] A-1 Garage v. Lange Investment Co., 6 Cal.App.2d 593, 44 P.2d 681, summarizes the nature of the monies paid upon the execution of a lease and states that they fall into four classes: (1) advance payment of rent; (2) as a bonus or consideration for the execution of the lease; (3) as liquidated damages; and (4) as a deposit to secure faithful performance of the terms of the lease. When paid under the first class the lessor is entitled to retain the fund on default of the lessee. Curtis v. Arnold, 43 Cal.App. 97, 108, 184 P. 510; Weinreich v. Vernon, 109 Cal.App. 60, 61, 292 P. 651. There is no contention that the $6,000.00 paid by the lessee was to be considered a part of the rental. In fact, the lease particularly states that it was not.

[2, 3] If it falls under the second class, the lessee is denied recovery when the lease has been canceled through his fault. Ramish v. Workman, 33 Cal.App. 19, 21, 164 P. 26; Wood v. Hipwell, 107 Cal.App. 680, 692, 290 P. 1040. It is not argued that it falls in the third class. In the fourth class it has been stated that when the sum is deposited merely as security for the performance of the covenants by the lessee, without a penalty or forfeiture clause, the payment is valid to that extent, and the lessee is not entitled to a return of the fund upon a breach of the lease, but the lessor may look to the fund for damages proved and the lessee may recover the balance. Green v. Frahm, 176 Cal. 259, 263, 168 P. 114; Giddens v. Krogh, 116 Cal.App. 416, 2 P.2d 821; Gallagher v. McMann, 119 Cal.App. 688, 690, 7 P.2d 204.

[4] It is apparently defendants' position that they come within this classification within the meaning of the lease, as disclosed by the evidence and as interpreted by the jury in accordance with the instructions, in order to sustain the judgment in their favor.

The first mention of the original payment in the lease indicates that the lessor "in consideration of the sum of $9,000.00 to him in hand paid, hereby and subject to and upon the following terms and conditions * * * leases * * *" the premises. Then follows the additional agreement to pay the rent. Without considering any other provision of the lease, it would appear that this provision brings plaintiffs within the second clause mentioned and, under the cases cited, no recovery could be had by defendants if they were at fault. The only question is whether section 22 of the lease, pertaining to the disaster clause, created an ambiguity in the terms of the lease, as to the purpose for which this payment of $6,000.00 was made which would allow the production of evidence *aliunde* and from which the jury might reasonably find that the agreement was that the payment fell in the fourth clause mentioned.

The section provides that if, during the term of the lease, the premises shall be destroyed, and providing lessee is not in default, lessor *or his assigns* shall proceed to repair and rebuild, or at lessor's option, if he does not elect to rebuild or repair he may terminate the lease at any time up to July 1, 1954, by the payment to the lessee of $9,000.00 ("less any moneys, if any, as shall then be due or shall have accrued to the lessor to the date of such disaster.")

It is defendants' argument that this provision clearly indicates that the purpose of the payment was merely a trust fund or deposit to be held by the lessor or his assigns, and that his duty was to return that amount upon the happening of the event or events indicated. As to this provision, defendants' contention is well grounded.

The case of Bacciocco v. Curtis, 12 Cal.2d 109, 82 P.2d 385, 387, is somewhat similar and the principle of law involved in the instant action appears to be disposed of by the holding in that case. There, the lease provided that "'as a bonus for the lessor's execution of this lease, the lessee has paid him, *unconditionally* upon execution thereof the sum of five thousand dollars ($5,000.00),' to be credited on the last five months' rent." (Italics ours.) That lease then contains a provision "that in the event of the termination of the lease by destruction of the building, the lessor 'will pay the lessee so much of the said sum of five thousand dollars ($5,000.00) as shall not theretofore have been so credited upon the rent'." Another provision was to the effect that the lessor would pay interest upon the $5,000 semi-annually. The Supreme Court held that the provisions last mentioned created an ambiguity despite the "unambiguous characterization of the sum as a 'bonus'." It affirmed the trial court in admitting parole evidence concerning the interpretation of that paragraph, and affirmed a judgment which held that the payment was a deposit for security. The phraseology in the Bacciocco case specifically describing the money as a bonus and stating that it was *unconditionally* paid, is stronger than in the lease before this court. However, it is true that here the lessor did not agree to pay interest. However, that may be explained by the parole evidence which was that only $6,000 was in fact paid, and the rental was increased from the original $750 agreed upon to $900, and the lessor was to pay taxes and insurance amounting to approximately $70 per month.

In Redmon v. Graham, 211 Cal. 491, 295 P. 1031, there was a deposit of $5400 made with the lessor by the lessee in addition to the yearly rental. Defendants failed to pay a part of the rent due and plaintiffs gave notice to quit and brought their proceeding in unlawful detainer. The chief question presented was whether the lessors were entitled to retain the deposit of $5400. The lease provided that that sum was to be paid as security for the performance by the lessee of the covenants contained therein and upon breach the lessor should have the right to keep the same as his own for liquidated damages, and if the lessee performed all of the covenants, that sum should be applied as payment for the last three months' rent. The court held that the provision for the retention of that sum is a penalty and void within the meaning of section 1670 of the Civil Code. The conclusion was that the money was held as security and that the provision in the lease that the $5400 should be returned to the lessee upon the accidental destruction of the premises was evidence of that construction and wholly inconsistent with the idea of an absolute payment in advance, with title to the money passing to the lessor. It is true that the lessor, or his assigns, in the present case, had the option to repair or pay the $9,000. It is nevertheless impossible to reconcile the provision in the lease here involved with plaintiffs' contention that the money was paid as a bonus or as consideration for the lease.

As to the facts surrounding the execution of the lease, defendant Swiryn testified, over objection, that previous to its execution he contacted a real estate broker in reference to the leasing of the Inn; that Mr. Tharalson took him there and told him that the possibilities of the place were great; that he wanted a deposit of $10,000 "as security of good faith," and wanted $750 a month rent and wanted him to purchase the stock inventory of the cafe and to pay the insurance and taxes which amounted to about $70.00 a month; that about a week thereafter he went to the office of Tharalson's lawyer, at which time Tharalson repeated this conversation and that upon those terms he was willing to execute a ten-year lease. He then said that he told him he could not raise "$10,000 as a deposit" but could only raise $6,000; that Tharalson then told him that he would take the "$6,000 as a deposit," would make the rent $900 a month, and that he would give him a *paid bill of sale for the stock and inventory* and the lease for ten years, and that he would, in the lease, give him credit for a "$10,000 deposit"; that he looked up his own lawyer to approve of such a lease when it was prepared; that he subsequently took possession and that a short time thereafter plaintiff Thompson informed him that he was then his landlord, having purchased the property; that he told Thompson of the fact that he was unable to meet the terms of the lease, due to the business recession; that he told Thompson that if he would give him $2,000 cash out of the "*deposit*" he had made under the terms of the original lease he could pay for the three months' delinquent rent and that it would be to his advantage and would help him to sell the lease.

Defendant offered in evidence a rough draft of a purported agreement which he claims he submitted to Thompson in this respect. These notes recite that the new lease would contain the following agreement: "Period of seven years, starting as of May 1st, 1948 * * * I will agree to a reduction of the *money on deposit* consisting of $9100 cash to $7,000." The difference of $2100 was to be applied as the back rent for the months of February, March and April "starting me off clear and clean." Defendant's testimony is that when he presented this memo to Mr. Thompson, Thompson said that the plan suggested by the defendant would give him no assurance that defendant could continue to make any money and that therefore "it is not a concrete plan." He then testified that Thompson, however, said he would show his plan to his banker and that Thompson would do everything in his power to have defendant stay on the premises because he wanted an attendant in there and did not want the place empty; that he had a prospect for sale of the Inn and wanted defendant to cooperate with him; that he told Thompson that he would not do anything to hurt the sale and that if he sold it they would both be better off and that he was willing to do this as long as it was to his advantage, and that Thompson never said anything to him about paying up the rent that was past due.

It is apparent from this evidence that the defendant regarded the original deposit as a deposit for the security of the performance of the contract and not as consideration for the lease.

Tharalson testified that he told Swiryn that he wanted $9,000 for the business and inventory; that the first month's rent would be $750 a month plus insurance and taxes, or $900 otherwise; that he finally agreed to take $6,000, $5100 for the inventory and for the business and $900 the first month's rent; that if the slot machines were removed the rent would be reduced; that he told the attorney to draw a lease providing for the $9,000 payment for the business and the inventory and $900 rental per month and defendant signed the lease.

Plaintiff Thompson testified that when the lease was assigned to him that he never received the $9,000 mentioned therein or the $6,000 claimed to have been paid to Tharalson by the defendant.

[5] Upon this conflicting evidence the jury inferentially found, under the instructions given, that the disputed amount was not given as a consideration for the execution of the lease but was given as a deposit for faithful performance. The evidence is sufficient to support this finding.

From a mathematical calculation the jury apparently determined that there was $3200 due to the plaintiff for accrued rental, and deducted this amount from the $6,000 deposit, leaving a balance of $2800 due to defendants from said deposit.

[6] The next complaint in this connection is that the jury failed to allow plaintiffs credit for the allowed $1978.84 which was supposed to cover the inventoried items such as meats, supplies, soft drinks, ice cream, etc., which were in the hotel at the time defendant took possession. It is apparent that the jury did not give plaintiffs credit for this item. However, there is evidence that the deposit made by the plaintiff covered the lease *and inventory* and also that the deposit covered a "paid bill of sale for the stock and inventory." There is no evidence that we could find that defendants did not leave an equal amount of stock in the hotel when they left. In support of the judgment we must assume that they did, or that a paid bill of sale should have been delivered covering this stock.

[7] The next claim is that the first month's rent was included within the original deposit and credit should be allowed in the jury's verdict for this amount. There is considerable confusion, according to the record, not only as to the amount of this original deposit but as to the item or items that it covered. Apparently, the jury was equally confused and allowed only the difference between the stipulated rent due and the amount of the deposit claimed to have been made by the defendant. We do not feel disposed to disturb the verdict by reason of this fact.

[8, 9] The last contention is that there is no privity of contract between plaintiffs and defendants in respect to the initial deposit and that therefore the defendant must recover this sum from the original lessor rather than from his assignee. The parties established contractual relations between themselves with reference to the demised premises by virtue of their execution of the original lease and amendment thereto, and the supplemental agreement and the addenda thereto. Paragraph 13 of the lease provides that if the estate of the lessor shall be conveyed and assigned "* * * then in such instances the same shall operate to thereafter relieve the respective assignor from any further liability hereunder." The assignment transfers to plaintiffs all right, title and interest of the lessors in and to the lease. What consideration passed between the lessor and the assignee is not disclosed. It is the general rule that a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all of the obligations arising from it so far as the facts are known, or ought to have been known, to the person accepting, and that he who takes the benefit must bear the burden. Civ. Code, secs. 1589, 3521.

Since the jury inferentially found that the plaintiffs were not entitled to relief under their complaint, and that the rent stipulated to be due at the time could have been taken from the deposit which was made to secure the performance of the obligations of the lease, the inferential finding that plaintiffs should not have judgment in their favor or attorneys' fees by reason of the institution of the action is supported by the evidence.

Judgment affirmed.

MUSSELL, J., concurs.

Hearing denied; SCHAUER, J., dissenting.

95 Cal.App.2d 605

WILKINS v. WILKINS.

Civ. 3894.

District Court of Appeal, Fourth District, California.

Jan. 17, 1950.

Della Louisa Wilkins sued Albert John Wilkins for divorce. A decree was entered requiring defendant to make monthly payments to plaintiff for support of herself and minor children of the parties. An execution for unpaid monthly payments was issued upon plaintiff's ex parte application, and defendant filed motion to vacate order fixing amount of judgment due for support and to recall a writ of execution, and set aside levy and sale.

An order denying defendant's motion was entered by the Superior Court of San Bernardino County, A. D. Mitchell, J., and the defendant appealed.

The District Court of Appeal, Griffin, Acting P. J., held that the trial court had right to recall the execution upon defendant's motion and allow enforcement of the judgment only to extent of defendant's legal and equitable liabilities to pay.

Order reversed.

See also 213 P.2d 752.

1. Parent and child ⚷3(1)

A father has duty to support children during their minority and as each child attains majority such duty terminates.

2. Divorce ⚷263, 311

While wife is entitled to execution on divorce decree requiring husband to make monthly payments for support of wife and minor children, affidavit, order and execution issued thereon are subject to review and execution is subject to recall, upon motion, timely made, at which time trial court may exercise its discretion in determining whether facts set forth in affidavit are true, and whether husband was under legal duty to support children or wife. Civ.Code, § 139; Code Civ.Proc. § 685.

3. Divorce ⚷263, 311

Where execution on divorce decree requiring husband to make monthly payments for support of wife and minor children was issued on wife's application, upon husband's timely application supported by affidavit showing that he was not liable for full amount because of marriage of minor children and wife during period for which recovery was sought, trial court had right to recall the execution and allow enforcement of the judgment only to extent of husband's liabilities to pay. Civ.Code, § 139; Code Civ.Proc. § 685.

Harry V. Leppek, Los Angeles, for appellant.

Waldo Willhoft, San Bernardino, for respondent.

GRIFFIN, Acting Presiding Justice.

Plaintiff and defendant were divorced. By the interlocutory decree, entered July 2, 1936, defendant was ordered "until further order of the court" to pay plaintiff $40 per month, payable semi-monthly on the 10th and 26th days of each month, commencing June 26, 1936, as and for the support of plaintiff and the two minor children, Alberta and Joseph Wilkins. On March 4, 1938, said sum was increased to $50 per month. In an ex parte application, on September 28, 1948, plaintiff filed an affidavit alleging that defendant paid $50 per month "up to and including August 10, 1943", but thereafter failed to make any further payments; that all payments subsequent to September 10, 1943, amounting to $2950, or "56 monthly payments," were unpaid under the order, and asked that execution be issued accordingly. On September 28, 1948, an order was signed allowing that amount, and ordering execution to issue. Execution did issue on that same date. On December 16, 1948, defendant moved to vacate the order and recall the writ issued on the ground that the court was not informed of the true facts when the order was signed. This motion was submitted. By affidavit of defendant, he claimed that he had made all payments due until July 10, 1943; that the minor daughter, Alberta, was married in August, 1939, at the age of 19; that the son, Joseph, was married in June, 1943, at about the age of 19, that plaintiff remarried in June, 1948, and that the interlocutory decree ordering the maintenance had never been modified and that said court order was never "severed" to show how much was to be paid for each child or to the plaintiff and therefore defendant claimed that no reason existed for said order to continue.

After argument, on December 30, 1948, the court signed an order denying the motion. Defendant, on February 17, 1949, appealed from the order on the clerk's transcript alone, which transcript sets forth the facts above related.

Defendant's opening brief raises the question as to whether plaintiff should be allowed the full amount ordered paid to the mother and minor children, jointly, after the date the minor children were married and became of age. In support of the contention that the order was erroneous, the defendant cites such cases as Parker v. Parker, 203 Cal. 787, 266 P. 283; Hale v. Hale, 6 Cal.App.2d 661, 45 P.2d 246; Clavey v. Lord, 87 Cal. 413, 25 P. 493; Doehla v. Phillips, 151 Cal. 488, 91 P. 330; and Tremper v. Tremper, 39 Cal.App. 62, 177 P. 868.

Plaintiff, in her brief, points out that at no time has she sought to collect any sums accruing under said order subsequent to her remarriage.

Sec. 139 of the Civil Code provides that the husband may be compelled to provide for the maintenance of the children and suitable allowance for the wife; that upon the wife's remarriage, the husband is no longer obligated to provide for her support; but that her remarriage shall not affect the husband's duty to provide for the children of his marriage.

[1] It has been definitely decided that it is a father's duty towards his children to support them during their minority and as each child attains majority this duty terminates. Tremper v. Tremper, supra; Hale v. Hale, supra.

From the record it appears that Alberta became of age in August, 1941, and Joseph about June, 1946, and under the authorities cited the father's duty to support them terminated as of that time. It was said in Hale v. Hale, supra, where a similar order was being questioned allowing the wife and minor children $45 per month for their support, that [6 Cal.App.2d 661, 45 P.2d 247]: "While it is true that defendant should have applied for a modification of the decree, as the decree does not specify separate amounts for the wife and each child, it is also true that, when under ordinary circumstances the duty of defendant to support plaintiff and two of the children had ceased, plaintiff was not in equity and good conscience entitled thereafter to the full amount set forth in the decree, nor to the issuance of execution therefor when the granting of the writ lies within the discretion of the court. To require defendant to be answerable for this full amount palpably effects an injustice."

It was there held that it was not the province of the appellate court to determine what portions of the entire amount, during the period in question, should be allowed for the support of the minor children and what amount should be allowed for the support of the wife, and that to do so would be to indulge in speculation and guess, citing Parker v. Parker, supra. It then held that the defendant could not avoid the portion of the obligation that appeared to be just and the proceedings were remanded to the trial court with directions to amend its order and the execution so that the order would be for the total sum due at the time of the application. Under the authorities cited, such a disposition must be made of this order on appeal.

Whether plaintiff should be permitted to recover any sums due under said order between the dates said minors were married and the dates they became of age is problematical.

In Hale v. Hale, supra, one of the minor children married, but about three weeks after the marriage she separated from her husband and thereafter lived with her mother until she became of age. Just what the factual situation is in the instant case pertaining to the dependency of the minor children after their marriage is not shown. Since the order on appeal must be reversed for the first reasons stated, the question as to the amount of the order that may be enforced by execution might be reconsidered by the trial court. It does not appear that defendant ever made application for modification of the decree because of the fact of the marriage of the minor children. No cases have been cited that hold that upon the marriage of a minor child the order for payment therefor *automatically* ceases.

In Cohen v. Cohen, 150 Cal. 99, 88 P. 267, 270, 11 Ann.Cas. 520, the wife was allowed alimony. The question of community property was not involved. Within a few months after the entry of the final decree the wife remarried and was subsequently divorced from her second husband. About four years later, the wife obtained an order requiring her first husband to show cause why an execution should not issue against him for the money due up to the date of the application notwithstanding her subsequent marriage. The court refused to vacate the decree as to the amounts already accrued but modified the former decree so that the payments would cease as of the date of her remarriage and directed that execution be issued for the sums previously accrued. The husband appealed. The Supreme Court held that: "Good public policy would not compel a divorced husband to support his former wife after she has become another man's wife, except under extraordinary conditions, which she should be required to prove. Unless such conditions are shown by her to exist, the court should, on the former husband's motion, cancel all payments accruing after the remarriage, in all cases where, as here, there are no children and the allowance is based solely upon the husband's probable earning capacity, or upon his breach of the marriage vows, and not upon existing property rights."

The order appealed from was reversed and the cause remanded for further proceedings in accordance with the opinion rendered.

Harris v. Harris, 10 Cal.App.2d 734, 52 P.2d 985, 54 P.2d 459, involved a joint order for $25 per month for the support of the wife and minor child. The child died during minority. The father paid the full amount up to the date of its death. The order attempted to be enforced included the full amount awarded, covering two years after the child's death and up to the date of the application. The court held in an action in the Municipal Court on said judgment, that the amount accumulated since the date of the death of the child was too uncertain to be enforceable and that since the municipal court judgment became final the order was sustained as having been once decided. In denying the petition for hearing, in the order involved in Harris v. Harris, supra, the court pointed out that the wife, however, had her right to proceed in the divorce action to recover any unpaid installments accruing to her prior to the date the order was made terminating the allowance.

Parker v. Parker, 203 Cal. 787, 266 P. 283, was a case where an order was made in 1912 for the sum of $40 per month for the support of the wife and minor child and where the wife, eight days after the entry of the final decree, remarried, was subsequently divorced and was awarded temporary alimony. She then, under her former name, thirteen years later, made an affidavit and presented the same to the court and averred that none of the payments had been made that were due and owing under the decree, and asked for an execution to issue in that sum. The application was made ex parte, was granted, and an order was made directing that execution issue. The former husband made a motion to vacate the order directing execution to issue and to recall the execution that had issued. In support of the motion the affidavits setting forth the facts were submitted. Under said motion the court endeavored to modify the former decree and the execution issued thereon, by reducing the amount. It then denied the motion to vacate the order directing the issuance of execution and to recall it. The defendant appealed from this order. During this period the child had married and had become of age. The Supreme Court, on appeal, speaking through Justice Shenk, said that in fairness to the trial court, the wife should have set forth the facts with reference to her subsequent marriage and the fact that the child had married and become of age at the time she made her application for the accumulated orders; that all of these matters would have been pertinent in the consideration by the trial court of the application and also in determining to what extent, if at all, the relief should have been granted in the exercise of a wise discretion. The court then held that if the defendant, as a judgment debtor, had good cause to show against the issuance and enforcement of process, he has his remedy by motion to vacate the order and recall the execution. In effect, the court held that a denial of this motion, under the circumstances related, was an abuse of discretion and required a reversal of the order. Then follows the holding, 203 Cal. at page 795, 266 P. at page 286, that "Where, as here, the minor became of age and married prior to such order of modification, such order should not disturb the accrual of payments under the original judgment. But whether such payments should be *enforced* and the *manner of the enforcement* of the same require separate consideration." (Italics ours.) Accordingly, the court held that on the showing made the former wife was not entitled to the *order directing execution to issue* in the full amount.

The only distinction between the cited cases and the one at bar pertains to the fact that the cited cases appear to involve orders for execution on judgments in excess of five years accumulation, where the instant one, according to the record, apparently involves one under five years.

In Lohman v. Lohman, 29 Cal.2d 144, 173 P.2d 657, the majority opinion held that a creditor is entitled, as a matter of right, to execution on a judgment payable in installments for all amounts which have accrued within five years of the date of the application. As to a judgment beyond that period, the issuance of an execution is discretionary, depending upon the circumstances. See sec. 685, C.C.P.

[2, 3] While the creditor is, as a matter of right, entitled to an execution, the affidavit, order and execution issued thereon are subject to review and the execution is subject to recall, upon motion, timely made, at which time the trial court may exercise its judicial discretion in determining whether the facts set forth in the affidavit are true, and whether there has been a misrepresentation of the facts or wilful suppression of facts which should have been related to the court in the first instance, or whether the husband was or was not under a legal duty to support the children or wife during the period in question. It therefore would appear that the trial court has, under the circumstances here related, the right to recall the execution and allow the enforcement of the judgment, only to the extent of the husband's legal and equitable liability to pay. If the rule were otherwise, a judgment creditor might falsely swear that a certain amount of money was due under the order, accumulated within the five-year period, when in fact the debtor had paid all or nearly all of the sums due prior to her application. It would be an injustice to hold that the execution must issue, as a matter of right, and the court had no power to order the execution withdrawn or to exercise its discretion in determining the truth of the facts related and to order enforcement according to the law and equities involved.

The court held, in Lohman v. Lohman, supra, that where issuance of an execution on a judgment requiring monthly payments is sought upon payments accruing within the five years and where such facts are established, a prima facie right to execution exists and the burden is cast upon the judgment debtor to establish facts justifying an order denying the writ.

Defendant, in his reply brief, for the first time, endeavors to raise the question of the jurisdiction of the trial court to issue a writ of execution, upon the claim that the supplemental execution was issued after the five-year period *without notice*. This point will be considered in a companion case, Wilkins v. Wilkins, Cal.App., 213 P.2d 752.

Ordered reversed.

MUSSELL, J., concurs.

95 Cal.App.2d 611

WILKINS v. WILKINS.

Civ. 4125.

District Court of Appeal, Fourth District, California.

Jan. 17, 1950.

Della Louisa Wilkins sued Albert John Wilkins for divorce, wherein a decree was entered requiring defendant to make monthly payments to plaintiff for support of herself and minor children.

An order denying motion to vacate order for writ of execution, to recall the writ and quash sale had thereunder was entered by Superior Court of San Bernardino County, A. D. Mitchell, J., and the defendant appealed.

The District Court of Appeal, Griffin, Acting P. J., held that defendant's motion should have been granted.

Order reversed.

1. Judgment ⚷565

The term "without prejudice" in its general adaptation, means that there is no decision of the controversy on its merits and leaves the whole subject in litigation as much open to another application as if no suit had ever been brought.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Without Prejudice".

2. Divorce ⚷287, 312.7

Where order denying divorced husband's motion to vacate previous order fixing amount of judgment due from him for support of divorced wife and minor children and to recall writ of execution, and to set aside levy and sale was reversed on appeal, subsequent order denying husband's motion to set aside order granting wife's application for what she denominated a "supplementary writ of execution" to enable her to proceed with sale under first order was required also to be reversed.

◆

Harry V. Leppek, Los Angeles, for appellant.

Waldo Willhoft, San Bernardino, for respondent.

GRIFFIN, Acting Presiding Justice.

The main facts are presented in Wilkins v. Wilkins, Cal.App., 213 P.2d 748. It appears from the clerk's transcript that on June 7, 1948, there was an intermediate application made by plaintiff for an order declaring that $2,800 was due under the decree, and an execution in that amount was ordered, ex parte. The sheriff's return shows that he levied upon certain real property under that execution. No sale was had and the execution was returned to the clerk's office on September 28, 1948. Apparently an attack was made, on November 12, 1948, upon this order by a motion by defendant to set aside and recall the execution issued. The trial court, for reasons not apparent, on November 19, 1948, denied it "without prejudice." Then followed the proceedings mentioned in the companion case. Wilkins v. Wilkins, supra. Upon the execution there mentioned, the sheriff levied upon certain other property but no sale was had thereunder. Plaintiff, through her attorney, by ex parte application, on December 15, 1948, had obtained what she denominates a "supplementary writ of execution," based upon the order appealed from. In his affidavit the attorney related that since there was no sale under the former writs and that since they had been returned to the clerk, a "supplementary writ" was needed in order to proceed with the sale under the order. A levy was made thereunder, upon both properties heretofore mentioned, and these properties were sold to plaintiff to satisfy the order. On July 22, 1949, defendant filed a motion to set aside the order of December 15, 1948, directing the issuance of execution, to recall the execution, to vacate the levy, and to set aside the sale under the execution on the grounds that the issuance of the writ and the sale thereunder was void because the order contained an amount, some of which accrued more than five years prior to the application, and no notice was given to defendant of such application for issuance of a writ of execution, citing sec. 685, C.C.P.; Da Arauje v. Rodriques, 50 Cal.App.2d 425, 123 P.2d 154; and Castle v. Castle, 71 Cal.App.2d 323, 162 P.2d 656. On August 2, 1949, this motion was ordered denied. This appeal is from this order.

Plaintiff raises the point that since defendant failed to appeal from the order denying him relief in the original application and the time for appeal elapsed, the effect of filing this new application is a bar to a subsequent application and acted to merely extend his time to appeal. The denial of the first application for modification and to recall the execution was denied "without prejudice."

[1] The term "without prejudice," in its general adaptation, means that there is no decision of the controversy on its merits, and leaves the whole subject in litigation as much open to another application as if no suit had ever been brought. Newberry v. Ruffin, 102 Va. 73, 45 S.E. 733; 45 Words and Phrases, Perm. Ed., page 439. We see no merit to this contention.

[2] The record is very confusing as to whether the accumulated amount claimed due under the affidavits was for a period within, or was for a period in excess of five years. Under the holding in the companion case it is not necessary to determine this issue. Since the order appealed from in the companion case was reversed, it follows that the order in the instant case must be reversed.

Order reversed.

MUSSELL, J., concurs.

95 Cal.App.2d 635

PEOPLE v. BISCAILUZ, Sheriff.

Civ. 16989.

District Court of Appeal, Second District,
Division 3, California.

Jan. 19, 1950.

Hearing Denied March 16, 1950.

Proceeding in mandamus by People of the State of California, successor to California Employment Stabilization Commission, successor to California Employment Commission (formerly Unemployment Reserves Commission) against E. W. Biscailuz, Sheriff of the County of Los Angeles, to compel defendant to pay sum in his possession pursuant to levy of an attachment.

The Superior Court of Los Angeles County, Clarence M. Hanson, J., discharged alternate writ of mandamus and denied a peremptory writ, and plaintiff appealed.

The District Court of Appeal, Shinn, P. J., held that the failure of the state to reduce its claim for delinquent payments of contributions to a lien pursuant to Unemployment Insurance Act, prevented state from claiming a superior right to creditor's attachment lien.

Judgment affirmed.

1. Insolvency 🔑24

In the absence of controlling statutory definition, "insolvency" usually refers to inability to meet one's obligations as they mature in the ordinary course of business, rather than an excess of liabilities over assets.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Insolvency".

2. United States 🔑76

Under federal priority statute, "insolvency" requires that there shall be an insolvent debtor not having sufficient property to pay all his debts. 31 U.S.C.A. § 191.

3. United States 🔑76

Under the federal priority statute, a showing is required in each case that debtor has insufficient assets to pay all his debts, and that he has made a voluntary assignment thereof or committed an act of bankruptcy. 31 U.S.C.A. § 191.

4. United States 🔑76

The federal government enjoys no general common-law rights as a creditor, and its priority is wholly statutory in nature.

5. Taxation 🔑509

The statutory priority conferred upon state for its claims for contributions from employers by Unemployment Insurance Act is but one phase of a comprehensive plan designed to insure prompt payment in full of all required contributions, and is manifestly intended to enlarge availability of statutory priority conferred by original act. Gen. Laws, Act 8780d, § 46(a).

6. Executors and administrators 🔑261
Taxation 🔑509

Where revised section of state Unemployment Insurance Act extended priority of state claims for employer's contributions due under the Act to non-statutory general assignments, insolvent probate estates, and levies upon assets of dishonest or absent employers irrespective of insolvency, legislature intended by use of word "insolvent" to limit general application of state's priority right when it extended priority to specific situations not previously reached, and phrase "whenever the employing unit is insolvent" was used as a convenient and inclusive reference to financial distress of same nature as was covered by previous provisions, that is, insolvency either in common-law sense or in bankruptcy sense. Gen. Laws, Act 8780d, § 46(a).

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Insolvent".

7. Taxation 🔑509

Under Unemployment Insurance Act, proof of inability of an employer to meet his obligations as they fall due provides a sufficient basis for invoking priority conferred by the Act in favor of state for claims for employer's contributions due under the Act. Gen. Laws, Act 8780d, § 46(a).

8. Taxation 🔑509

Where employer was unable to pay his debts as they became due, he was "insolvent" within meaning of Unemployment Insurance Act, and state would be entitled to assert a lien for employer's contributions due under the Act against any funds in employer's hands. Gen. Laws, Act 8780d, § 46(a).

9. Taxation 🔑510

Under Unemployment Insurance Act providing that state is entitled to have its claim for delinquent payments of contributions satisfied first in event of an employer's insolvency, state's claim does not amount to a lien or to a preference over specific liens created in favor of third parties, before state commences proceedings to enforce its claim. Gen. Laws, Act 8780d, § 46(a).

10. Attachment 🔑177

A levy of an attachment creates a specific lien.

11. Taxation 🔑509

In action by state to enforce priority of its claims for delinquent payments of contributions under Unemployment Insurance Act, any right of priority which state had would be derived from the statute alone. Gen. Laws, Act 8780d, § 46(a).

12. Taxation 🔑509

The priority conferred upon the state in Unemployment Insurance Act for delinquent payments of contributions due from an employer who is insolvent, contemplates pendency of appropriate proceedings in which, as against conflicting claims of other creditors of the insolvent, that of the state may enjoy its statutory priority. Gen. Laws, Act 8780d, § 46(a).

13. Taxation 🔑509

Where only provision relating to liens created by levies under process of law in Unemployment Insurance Act grants state a priority for delinquent payment of contributions due after levy, and methods by which state may acquire a lien are provided for, rule, "inclusio unius exclusio alterius", applies and state before reducing its claim to a lien, is entitled to no preference over valid liens created by a debtor or his creditors. Gen. Laws, Act 8780d, § 46(a).

14. Taxation 🔑510

Where state had claim under Unemployment Insurance Act for delinquent payments of contributions of employer but had not reduced its claim to a lien in accordance with outlined statutory procedure, the lien of an attaching creditor of employer was superior to claim of state, and would be enforced. Gen. Laws, Act 8780d, § 46(a).

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Fred N. Howser, Attorney General, Chas. W. Johnson, Deputy Attorney General, Vincent P. Lafferty, Deputy Attorney General, for appellant.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

SHINN, Presiding Justice.

The State of California, as successor to the California Employment Stabilization Commission, instituted this proceeding in mandamus to compel the Sheriff of the County of Los Angeles to pay over to it the sum of $275.84 which was in his possession pursuant to levy of an attachment upon the bank account of Joe C. Hidalgo, issued in Los Angeles Municipal Court action (No. 835383) entitled Max Speilberg v. Joe C. Hidalgo. The petition alleged that subsequent to January 1, 1947 Joe C. Hidalgo was "an employer" within the meaning of the Unemployment Insurance Act; he was delinquent in payments of contributions pursuant to the Act for the year 1947 in the amount of $403.37; he was "unable to pay his debts in the ordinary course of business" as they became due and was insolvent; petitioner had notified the sheriff of its claim against Mr. Hidalgo and had demanded that the money in his hands pursuant to the above mentioned attachment be paid over to petitioner in partial satisfaction of the delinquent contributions, but the latter had refused to comply with the demand. It was also alleged that the petitioner had no plain, speedy, or adequate remedy in the ordinary course of law for the enforcement of its statutory right to have its claim satisfy first in the event of an employer's insolvency. Unemployment Insurance Act, Deering's Gen. Laws, Act 8780d, § 46(a).

Respondent filed a general demurrer to the petition, and also an answer denying the material allegations of the petition. After a trial, the court made findings that Mr. Hidalgo was not insolvent and that petitioner was not without another sufficient remedy, but that in all other respects the allegations of the petition were true. As conclusions of law the court held that the complaint did not state a cause of action and that the Unemployment Insurance Act did not give petitioner a prior right to the funds in the hands of the sheriff. Plaintiff has appealed from the judgment discharging the alternative writ and denying a peremptory writ.

Although the record is not clear on the point, it appears to be conceded in the briefs of both parties that the claimed delinquency was solely in respect to payments of the employer's share of the required contributions.

Petitioner's claim to the money in the sheriff's custody is predicated upon section 46 of the Act, which reads as follows: "The wage-earner and employer contributions required to be paid by any employing unit under this act, together with interest and penalties, shall be satisfied first in any of the following cases: (a) Whenever the employing unit is insolvent. (b) Whenever the employing unit makes a voluntary assignment of his assets. (c) Whenever the estate of the employing unit in the hands of executors, administrators, or heirs is insufficient to pay all the debts due from the deceased. (d) Whenever the estate and effects of an absconding, concealed, or absent employing unit required to pay any amount under this act are levied upon by process of law. This section does not give the State a preference over any recorded lien which attached prior to the date when the amounts required to be paid became a lien. The preference given to the State by this section shall be subordinate to the preferences given to claims for personal services by sections 1204 and 1206 of the Code of Civil Procedure."

[1] Petitioner asserts that the facts bring the case squarely within the scope of subdivision (a) of section 46, and attacks the court's finding that Hidalgo was not insolvent as being wholly unsupported by the evidence. It is to be noted that the term insolvency is not defined either in section 46 or elsewhere in the Act. Two distinct and well-defined meanings of the word have been generally recognized, depending upon the nature of the circumstances and the purposes for which it is used. It is necessary to determine which one is to be applied, for, as we shall see, Hidalgo was shown to be insolvent under one definition but not under the other.

See Gaspar v. United Milk Producers of California, 62 Cal.App.2d 546, 554–555, 144 P.2d 867; Ruggles v. Cannedy, 127 Cal. 290, 302, 53 P. 911, 59 P. 827, 46 L.R.A. 371. In some situations insolvency refers to an excess of liabilities over assets, see Bankruptcy Act of 1898, as amended, 11 U.S.C.A. § 1 (19), and National Refining Co. v. Pennsylvania Petroleum Co., 8 Cir., 66 F.2d 914, 918, bankruptcy; Civil Code, sec. 3439.02; and Miller v. Keegan, 92 Cal.App. 846, 851, 207 P.2d 1073, fraudulent conveyances; whereas in others it refers to inability to meet one's obligations as they mature in the ordinary course of business, see American Can Co. v. Erie Preserving Co., C.C.W.D.N.Y., 171 F. 540, 542, equity receivership; Civ.Code, secs. 1777, 1796(3), stoppage in transitu; Civ.Code, sec. 3450 and Jeggle v. Mansur, 9 Cir., 17 F.2d 729, 732, statutory assignment for benefit of creditors; Hoehn v. Crews, 10 Cir., 144 F.2d 665, 674, insolvency of national bank; Artesian Water Co. v. C. I. R., 9 Cir., 125 F.2d 17, exemption of insolvent corporation from payment of excess profits tax. The latter meaning has been widely followed in the absence of controlling statutory definition, Dixon Lumber Co. v. Peacock, 217 Cal. 415, 421, 19 P.2d 233; Alpha Hardware & Supply Co. v. Ruby Mines Co., 97 Cal.App. 508, 515, 275 P. 984; Meighan v. Finn, 2 Cir., 146 F.2d 594, 595, affirmed 325 U.S. 300, 65 S.Ct. 1147, 89 L.Ed. 1624, especially where applied to persons engaged in commercial pursuits, Bell v. Ellis, 33 Cal. 620, 625; Parker v. First Nat. Bank, 96 Okl. 70, 220 P. 39; Akin v. Hull, 222 Mo.App. 1022, 9 S.W.2d 688, 690–691; Woodman v. Butterfield, 116 Me. 241, 101 A. 25, 29. According to appellant, the latter meaning was intended in section 46. Analysis of the statute discloses this contention to be sound.

[2-5] The language of section 46 was evidently influenced considerably by the terms of the earlier federal priority statute, United States Revised Statutes, sec. 3466, 31 U.S.C.A. § 191, which reads: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." It has uniformly been held that the final clause of section 3466 "defines or explains the meaning of insolvency referred to in the earlier part", and thus, in terms, "requires that there shall be an insolvent debtor 'not having sufficient property to pay all his debts.'" United States v. Oklahoma, 261 U.S. 253, 259–260, 43 S.Ct. 295, 298, 67 L.Ed. 638, and cases there cited. Accordingly, the federal statute has been construed to require in each case a showing that the debtor has insufficient assets to pay all his debts, and also that he has made a voluntary assignment thereof or committed an act of bankruptcy, etc. See note, 67 L.Ed. 638-642. However, the constructions that have been given the federal act do not fit the State enactment. Section 46 differs from the federal act in language and in punctuation. The quoted language defining insolvency in the federal act is absent from section 46. We must look elsewhere for the correct definition. The status of insolvency clearly gives the State a preferential position without the concurrence of any other condition specified in the section. Again, if appellant is correct in asserting that section 46 incorporates, and thus should be construed consistently with, the common law preference enjoyed by the sovereign (see cases cited post), the cases construing the federal statute would not aid respondent, since it is settled that the federal government enjoys no general common law rights and that its priority is wholly statutory in nature. 28 Am.Jur., sec. 68, p. 814. Finally, the federal statute deals merely with debts generally, whereas section 46 treats of a particular obligation in the nature of a tax, and must accordingly be given a construction consistent with the policy of the taxing statute.

[6-8] The statutory priority conferred upon the State by section 46 of the Act, as will hereafter appear, is but one phase of a comprehensive plan designed to ensure prompt payment in full of all required contributions. The repeal of the previous section 46 in 1945, and concurrent enactment of section 46 in its present form, were manifestly intended to enlarge the availability of the statutory priority conferred by the original act. Whereas the former priority section applied in cases of "bankruptcy of any employer, or of liquidation of such employer under any law of this State by reason of insolvency or *inability to pay his debts"*, sec. 46, Stats. 1935, p. 1234, as amended, Stats. 1937, p. 2068; emphasis added, the revised section specifically extended the priority to non-statutory general assignments, insolvent probate estates, and levies upon the assets of dishonest or absent employers irrespective of insolvency. It would be unreasonable to assume that, except where otherwise clearly expressed, the legislature intended by use of the word "insolvent" to limit the general application of the State's priority right when, in the same enactment, it extended the priority to specific situations not previously reached. The phrase, "whenever the employing unit is insolvent", appears to have been used in a broad sense as a convenient and inclusive reference to financial distress of the same nature as was covered by the previous provisions, that is, insolvency either in the common law sense or in the bankruptcy sense. To accord this meaning to section 46(a) is to bring it into harmony with its companion sections: 44(b), which deals with the status of employee contributions in the hands of an employer in the event of his "insolvency or bankruptcy"; section 46.1, which imposes a duty upon "every assignee, receiver, trustee in bankruptcy, or other representative of an insolvent employing unit" to notify the commission of his assumption of office; and section 457, which by reference to section 46, grants a similar preference as to any moneys received by an employer under a voluntary disability compensation plan in the event of "the bankruptcy or insolvency of the employer or the appointment of a receiver for the business of the employer". We conclude that proof of inability of an employer to meet his obligations as they fall due provides a sufficient basis in a proper case for invoking the priority conferred by section 46.

[9] Although there was no evidence that Hidalgo's liabilities exceeded his assets, petitioner contends, and respondent has not seriously argued to the contrary, that all of the evidence tended to prove that Hidalgo was unable to pay his debts as they became due. The case for the respondent is argued from this premise and, as we have seen, it follows that Hidalgo was shown to be insolvent within the meaning of section 46(a).

[10-12] We are thus brought to the question whether the State is entitled to assert its claim to the attached funds in preference to the attaching creditor. Appellant contends that section 46 is a statutory expression of the common-law prerogative right of the sovereign state to preference of its claims over those of general creditors of an insolvent. See 28 Am.Jur., sec. 76, p. 823; annotations 51 A.L.R. 1356, 65 A.L.R. 1332, 90 A.L.R. 185, 167 A.L.R. 640. We need not decide whether, or to what extent, the right may exist in California, cf. In re Estate of Norris, 37 Cal.App.2d 155, 99 P.2d 294; Pauley v. State of California, 9 Cir., 75 F.2d 120, 133–134, for it appears to be settled that it does not amount to a lien or to a preference over specific liens created in favor of third parties before the state commences proceedings to enforce its claim. In re Gruner, 295 N.Y. 510, 68 N.E.2d 514, 167 A.L.R. 628; Id., 296 N.Y. 668, 69 N.E.2d 822; Marshall v. People of State of New York, 254 U.S. 380, 382–384, 41 S.Ct. 143, 65 L.Ed. 315; United States Fidelity & G. Co. v. Bramwell, 108 Or. 261, 217 P. 332, 32 A.L.R. 829, and cases there cited. Levy of an attachment, of course, creates a specific lien. Aigeltinger v. Einstein, 143 Cal. 609, 615, 77 P.2d 669, 101 Am.St.Rep. 131; McCaffey Canning Co., Inc., v. Bank of America, 109 Cal.App. 415, 423, 294 P. 45. Thus, in Wise v. L. & C. Wise Co., 153 N.Y. 507, 47 N.E. 788, wherein the sovereign prerogative was asserted in respect

to a tax claim which had not been reduced to a lien, it was squarely held that the claim would not be accorded any preference over the lien of an attaching creditor. Likewise, in Re Atlas Iron Const. Co., 19 App.Div. 415, 46 N.Y.S. 467, 470, the court held that the lien of an attachment prevailed over tax claims, saying, "The title to the property became subordinated to that lien thus acquired, and it is quite clear that neither the state nor the city would have been entitled to take this property out of the hands of the sheriff after he had levied upon it under the attachment, to be applied to the payment of taxes against the corporation". 46 N.Y.S. at page 470; see also In re Henke's Estate, 193 Misc. 52, 81 N.Y.S.2d 79. To the same effect are Beaston v. Farmers' Bank, 12 Pet. 102, 9 L.Ed. 1017; Prince v. Bartlett, 8 Cranch. 431, 3 L.Ed. 614; and United States v. Canal Bank, Fed.Cas.No. 14,715, 3 Story 79, applying the federal priority statute. In placing reliance upon In re Lehrer-Howard, Inc., 181 Misc. 683, 44 N.Y.S.2d 494, which applies the common law prerogative in respect to unemployment contributions, appellant overlooks the distinguishing fact that no prior liens were involved. This case, and others cited by appellant, are fully consistent with the controlling rule stated in the early case of Commissioners of Public Accounts v. Greenwood, 1795, 1 Desaus. (S.C.) Eq. 450, 20 S.C.Rep. 169 that "by the common law the king was entitled to a preference only * * * in cases where he and the subject stood in equal degree." It follows that any right of priority which the state may have in the present case must be derived from the statute alone.

It is conceded by appellant that section 46 does not create a lien in favor of the State, but merely a right to have its claim satisfied first. The nature of the right, and its relationship to Speilberg's prior attachment lien may best be determined by reference to the Unemployment Insurance Act as a whole. The Act contains comprehensive provisions for enforcing payment of delinquent contributions:

Section 45.1 provides that contributions are "collectible by civil action", which action is given preference over all other civil litigation except equity cases, proceedings for extraordinary writs and summary proceedings; and in such an action the commission's certificate "showing the delinquency shall be prima facie evidence" of payment of wages by the employer, levy of contributions, compliance by the commission with all the provisions of the Act, and the delinquency.

Section 45.8 provides that if an employer is delinquent the commission may give notice thereof "to all persons having in their possession or under their control any credits or other personal property belonging to such delinquent employing unit, or owing any debts to such employing unit * * *"; that any persons so notified shall make no disposition of such property without the commission's consent or until 20 days shall have elapsed; and that they must within five days advise the commission of the extent of such property or debts in their possession or owing by them. It is provided also that the word "person" as used in section 45.8 includes the state, any county, municipality, district or other political subdivision thereof.

Section 45.9 establishes a procedure whereby the commission may obtain summary judgment against a delinquent employer, the recording of an abstract of which "shall constitute a lien upon all the property of the employer in such county, owned by him or which he may afterwards and before the lien expires acquire, which lien shall have the force, effect and priority of a judgment lien." Execution may issue upon such a judgment as in other civil proceedings.

Section 45.10 provides that the recording of the commission's certificate with the county recorder creates a lien in the amount of the delinquency upon all real property of the employer in the county owned by him or thereafter acquired, with the force, effect and priority of a judgment lien. This section further provides for the issuance by the commission of "a warrant for the enforcement of any liens and for the collection of any amount required to be paid to the State under this act", which has "the same effect as a writ of execution", and under which levy and sale upon the employer's property is had "in the same manner and with the same effect as a levy of and a sale pursuant to a writ of execution."

[13, 14] Section 46 is thus seen to be but one in a series of detailed provisions designed to implement the collection of contributions. The State is accorded certain simple and expeditious procedures for acquiring and enforcing a lien upon the property of a delinquent employer. As long as the employer is possessed of sufficient leviable assets to satisfy the delinquency, the prescribed remedies are adequate to protect the interests of the unemployment insurance program, even though the employer may be insolvent. The priority conferred by section 46(a) would appear to be intended to apply in cases of insolvency where the State would otherwise be required to share upon an equal footing with general creditors of the employer. Section 46 thus contemplates the pendency of appropriate proceedings in which, as against the conflicting claims of other creditors of the insolvent, that of the State may enjoy its statutory priority. Any other interpretation would be inconsistent with the clear implications of the language used. In the first place, section 46(d) grants the State a priority where there has been a levy upon the property of an absconding, concealed, or absent employer even though he may be solvent. It appears to have been the legislative intention to give the State priority over an attachment or execution levied in such cases. Since this is the only provision relating to liens created by levies under process of law, the absence of a like provision applied to such levies under other circumstances calls for the application of the rule *inclusio unius exclusio alterius.* The several provisions which relate to the State's preference are inconsistent with the idea that the State in all cases is to be paid first. There is a simple procedure by which the State could have improved its position with respect to prospective liens from that of a preferred creditor to the status of a lienholder, and if the State had availed itself of this procedure its lien, of course, would have taken precedence over subsequent liens created by the debtor or by action of his creditors which would be valid as to general creditors. The State is here claiming the status of a holder of a first lien despite its failure to follow the statutory procedure, and its contention necessarily is that the mere existence of the tax liability gives it the same preference it would enjoy as a lienholder. Clearly this is not the purpose of the Act. Upon the contrary, it seems clear that the methods by which the State may acquire a lien were provided for the reason that the State will enjoy no preference over valid liens created by the debtor or through action of his creditors before the State has reduced its claim to a lien. To hold in the present case that section 46(a) confers a right upon the State superior to Speilberg's attachment lien would be to treat the provisions by which the State may acquire a lien as meaningless and unnecessary.

We conclude that the sheriff was under no duty enjoined by law to turn over the property under attachment to the State. It therefore becomes unnecessary to inquire into the propriety of mandamus as a remedy.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

Hearing denied; TRAYNOR, J., dissenting.

95 Cal.App.2d 731

MACK et al. v. GOLINO et al.

Civ. 16983.

District Court of Appeal, Second District, Division 3, California.

Jan. 26, 1950.

Eva M. Mack, Guardian of the Estate of Caroline Starr, sued Marie Teter Golino to set aside a trustee's sale of real property under provisions of a trust deed.

Judgment for defendants, the Superior Court, Los Angeles County, William M. Byrne, Judge pro tem, denied plaintiff's motion for a new trial and plaintiff appealed.

The District Court of Appeal, Wood, J., held that a sale, under a trustee's deed where mortgagor waived defective publication by his actions and trustee's deed recited that sale was duly postponed, was valid.

Judgment affirmed.

1. Mortgages ⚷356

Under statute requiring that notice of sale under a trust deed shall be published at least 20 days before date of sale, a notice of sale under trust deed which was published 17 days before date of sale was defective. Civ.Code, § 2924; Code Civ. Proc. § 692.

2. Mortgages ⚷356

Where a sale was conducted under a trust deed, and there was a defect in the notice of publication, but the mortgagor did not allege defect in his complaint, in action to set aside sale nor raise issue at trial nor upon motion for new trial, the defect was waived and the sale was not void. Civ. Code, § 2924; Code Civ.Proc. § 692.

3. Mortgages ⚷357

Where a trust deed provided that a trustee could postpone a sale by public announcement at the time fixed for sale, such a postponement was valid. Civ.Code, § 2924; Code.Civ.Proc. § 692.

4. Evidence ⚷383(7)

Where a trust deed provided that recitals in trustee's deed of any facts would be conclusive proof of the truthfulness thereof, a recital that "sale was duly postponed to * * * ", was valid and conclusive that sale was duly postponed. Civ. Code, § 2924; Code Civ.Proc. § 692.

5. Mortgages ⚷369(4)

If a sale under a trust deed were regarded as voidable, the failure of mortgagor to be ready, willing and able to tender full amount due prevented mortgagor from having sale set aside. Civ.Code, § 2924; Code Civ.Proc. § 692.

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Hugh E. Macbeth, Hugh E. Macbeth, Jr., Chiyoko Sakamoto, Los Angeles, for appellant.

Myron W. Silverton, Los Angeles, for respondents.

WOOD, Justice.

Action to set aside a trustee's sale of real property under the provisions of a trust deed. Judgment was for defendants, and plaintiff appeals.

Appellant contends that the sale was invalid because there was no proper publication of notice of sale; and that the evidence was insufficient to support the finding that the sale was regularly conducted.

The trust deed (which was a second trust deed) was executed on November 4, 1946, by Caroline C. Starr in favor of defendants to secure the payment of a promissory note for $564.58, which note was payable in 90 days after said date. On March 13, 1947, defendants caused a notice of default to be recorded. On June 17, 1947, a notice of trustee's sale was sent by mail to Mrs. Starr, and a notice of the sale was posted on the property. A notice of the sale was published in a newspaper, duly authorized to publish such a notice, an June 20, June 27, and July 4, 1947. Those notices recited that the sale would be held on July 7, 1947, at 10 a.m., at the east entrance of the Hall of Justice in Los Angeles. On said July 7th the defendants authorized the trustee, upon the request of Mrs. Starr, to postpone the sale for two months. A representative of the corporation, which was the trustee, testified that the trustee postponed the sale for two months from said July 7th. It does not appear, however, in what manner the postponement was made. The defendants sent a letter, dated September 15, 1947, to the trustee wherein they asked the trustee to proceed with the sale, and they also stated therein "I will try to attend the sale if you are able to hold it on Wednesday, September 17th." The said representative also testified that the sale was held on September 17, 1947; that Mrs. Marie Golino was at the sale; and that, "There were no bidders, so it was sold to Mrs. Teter [Golino] for the actual indebtedness against the deed of trust."

On March 12, 1947, a petition for the appointment of a guardian of the estate of Mrs. Starr, an alleged incompetent person, was filed. On August 15, 1947, it was adjudged that she was incompetent, but the guardian appointed on that date did not qualify as such guardian. On October 8, 1947, the present guardian was appointed, and on that date she qualified as guardian. This action by said guardian was filed on November 6, 1947. At the time of the sale herein, the unpaid amount of the first trust deed on said property was $1,166.68. The appraised value of the property on January 12, 1948, according to an appraisal in the guardianship proceeding, was $7,500.

[1, 2] Section 2924 of the Civil Code provides in part that a power of sale of real property, under the provisions of a trust deed, shall not be exercised until the trustee "shall give notice of sale, stating the time and place thereof, in the manner and for a time not less than that required by law for sales of real property upon execution." Section 692 of the Code of Civil Procedure provides among other things that before the sale of property on execution or under power contained in any deed of trust, notice of the time and place of sale of real property must be published once a week for a period of at least twenty days before the date of sale, in a newspaper of general circulation printed and published in the city in which the property is situated. As above stated, the notice of sale herein was first published on June 20, 1947, and the notice recited that the sale would be held on July 7, 1947. It appears therefore that the notice was not published "at least twenty days before date of sale," but was published seventeen days before the date of sale. That notice was defective in that it was not published for a sufficient length of time prior to July 7th. Under the circumstances in the present case, the defect in the publication of notice did not render the sale void. The sale herein was not made on July 7th, the date fixed in the notice, but the date of sale was postponed on July 7th to September 7, 1947, at the request of Mrs. Starr and by reason of her promise to pay the amount secured by the second trust deed. It was not alleged in the complaint herein that the publication of notice of sale was insufficient. The question as to the insufficient publication of notice was not raised at the trial, nor upon the motion for a new trial. There was no appearance on behalf of plaintiff at the hearing of the motion for a new trial. The finding of the trial court that the sale was regularly conducted includes an implied finding that under the circumstances here the publication was sufficient. The circumstances herein show that Mrs. Starr waived the defect in the publication of the notice. Mrs. Starr had not been adjudged incompetent at the time of said request and said postponement of the sale. The trial court found that at all times prior to August 15, 1947 (when she was adjudged incompetent), she was a competent person and that she had a full understanding of her rights and understood the nature and effect of what she did.

[3, 4] The sale was postponed again from September 7, 1947, to September 17, 1947, and the sale was made on said September 17th. It does not appear in what manner the postponement was made. The trust deed provides that the trustee may postpone a sale by public announcement at the time fixed for the sale. A trustee's sale may be postponed validly in such a manner. Holland v. Pendleton Mtg. Co., 61 Cal.App.2d 570, 574, 143 P.2d 493. The trust deed also provides that "The recitals in such deed [trustee's deed] of any matters or facts shall be conclusive proof of the truthfulness thereof." Such a provision "is valid and the recitals made in pur-

suance of it are conclusive, in the absence of grounds for equitable relief." Holland v. Pendleton Mtg. Co., supra, 61 Cal.App.2d page 576, 143 P.2d page 496. The trustee's deed recites that the "sale was duly postponed to Wednesday, September 17, 1947, at 10:00 o'clock A.M. of said day." In the case of Leonard v. Bank of America, etc., Ass'n, 16 Cal.App.2d 341, 60 P.2d 325, the plaintiff contended that the trustee's sale under a trust deed was void for the reason that the notice of sale was not properly posted. In that case the trust deed contained a provision, similar to the provision in the trust deed herein, to the effect that the recitals in the trustee's deed shall be conclusive proof of the truthfulness of the recitals. The trustee's deed in that case recited that the trustee gave notice of sale in compliance with the terms of the trust deed. The court therein said, 16 Cal.App.2d at page 345, 60 P.2d at page 327, "The covenant just quoted [referring to said provision in the trust deed], and the recitals of the deed executed in pursuance thereof conclusively estop the plaintiff from claiming in respect to any matter embraced in said covenant or in the said recitals, that this was a void sale." It is not contended that Mrs. Starr was not competent when she made the trust deed on November 4, 1946. The court found that she was competent at that time. By reason of the provision in the trust deed herein to the effect that the recitals in the trustee's deed shall be conclusive proof of the facts recited therein, it must be concluded that the "sale was duly postponed" to September 17, 1947. The sale was not void.

[5] Even if the sale should be regarded as voidable, it appears that a tender of the amount due on the obligation was not made. The complaint alleged that about May 9, 1947, Mrs. Starr tendered the full amount of principal and interest to defendants; and that she "is still ready, willing and able to perform said restitution." The court found that said allegations were not true. Therefore, even if the sale should be regarded as voidable, it should not be set aside since the plaintiff failed to offer to do equity. In the case of Leonard v. Bank 16 Cal.App.2d at page 346, 60 P.2d at page 328: "[I]f the said sale be for any reason treated as voidable, nevertheless plaintiff is in no event entitled to have the same set aside through her own complete failure to offer to do equity."

The judgment is affirmed, and the appeal from the order denying motion for a new trial is dismissed.

SHINN, P. J., and VALLÉE, J., concur.

WEST KEY NUMBER SYSTEM

95 Cal.App.2d 816

BATCHELOR et al. v. MANDIGO.

Civ. 17187.

District Court of Appeal, Second District, Division 1, California.

Jan. 31, 1950.

Rehearing Denied Feb. 17, 1950.

Hearing Denied March 30, 1950.

J. Howard Batchelor and Leon E. Jurras sued Arthur Mandigo to recover treble damages under the Usury Law.

The Superior Court of Los Angeles County, Stanley Mosk, J., rendered judgment for the defendant, and plaintiffs appealed.

The District Court of Appeal, White, P. J., held that the transaction was not a loan so that the usury statute was inapplicable.

Judgment affirmed.

1. Usury 🔑18

A "loan" is the delivery of a sum of money to another under a contract to return at some future time an equivalent amount with or without an additional sum agreed on for its use, and if such is the intent of the parties, the transaction will be deemed a loan regardless of its form.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Loan".

2. Usury 🔑16

Courts will pierce the veil of any transaction designed as a cloak to cover the exaction of usurious interest, and substance and not form of transaction is controlling.

3. Usury ⚷18

Transaction whereby copartners received $15,000 from defendant, which with $10,000 of copartner funds, was used to acquire surplus war materials to be stored in copartners' warehouse and title to such materials was to vest in defendant under agreement, one of copartners was required to execute note for $15,000 secured by deed of trust on home and defendant was to receive $20,000 with interest at 5% on $15,000 from 80% of proceeds of sale of property, was not a "loan" so that usury statute was inapplicable and copartners could not recover treble damages on ground that usurious interest had been charged. Gen. Laws Act 3757, Const. art. 20, § 22.

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Macbeth & Ford, Los Angeles, for appellants.

J. Henry Schweitzer, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiffs brought an action to recover treble damages under the Usury Law of this state, Stats.1919, p. LXXXIII; Deering's Gen. Laws, Act 3757; Const. Calif. art. XX, sec. 22, alleging that within one year defendant had taken and received from them interest of $4,801.31 on a loan of $15,000. The trial court, hearing the case without a jury, found that the transaction was not usurious, and judgment was entered that plaintiffs take nothing. Plaintiffs appeal from the judgment and from an order denying their motion to vacate the judgment and enter another and different judgment.

Plaintiffs alleged that "On or about February 5, 1946, in the County of Los Angeles, plaintiffs were obligated by contract to pay $15,000.00 within three days to Douglas Aircraft Company, Inc. Being without liquid assets and having been deserted by certain expected backers, plaintiffs applied to defendant for a loan of $15,000.00. Defendant immediately made such loan, but in return therefor he exacted from plaintiffs their written agreement to pay him, within one year from February 5, 1946, $20,000.00 plus 5% interest on $15,000.00, and to furnish him the following security for his loan: (a) title to certain surplus war materials; and (b) the note of plaintiff J. Howard Bathcelor and his wife, in the sum of $15,000.00 and bearing interest at the rate of 5% per annum, which note should be secured by a deed of trust on the home of plaintiff J. Howard Bathchelor and his wife."

The agreement entered into by the parties is as follows:

"J. Howard Batchelor and Leon E. Jurras, co-partners, and doing business under the name of Bajur Hardware Co., acknowledge that they have this day received the sum of $15,000.00 from Arthur Mandigo, of Santa Barbara, California, which sum, together with $10,000.00 of co-partnership funds, they will use to purchase certain allotments of surplus war and other materials. The co-partners agree that title to all such materials shall be vested in Arthur Mandigo, and all such materials shall be his property until he shall have received the sum of $20,000.00, and when he shall have received such sum, said Arthur Mandigo shall, by proper assignment, transfer the title to any and all materials remaining unsold as the property of the co-partners.

"The co-partners hereby acknowledge that they have received the materials purchased with the above moneys, and will hold the same for Arthur Mandigo, as follows:

"All materials purchased, save and except paints, varnishes, thinners and other painting materials, shall be stored in a warehouse under the control of the co-partners at 1648—10th Street, Santa Monica, California, for said Arthur Mandigo, and the paints, varnishes, thinners and other painting materials shall be stored in a building under the control of said co-partners at 1206 Grant Street, Santa Monica, California, for said Arthur Mandigo.

* * *

"The co-partners shall have the privilege and right of selling any or all of the materials so purchased and stored for said Arthur Mandigo at such prices as they may determine to be proper and profitable, provided, that before any such sale or sales are consummated, they will first serve on Arthur Mandigo, or if he be not available, then his attorney, Thomas J. Dixon, a list of the materials so to be sold, and then and there obtain from said Mandigo or Dixon, as the case may be, a release of the materials so to be sold, and at which time, the co-partners will pay to said Mandigo or Dixon, eighty per cent (80%) of the sales price, the said co-partners retaining the remaining twenty per cent (20%) for operating expenses. When the eighty per cent (80%) of all sales made shall amount to $20,000.00 and shall have been paid to said Mandigo or Dixon, then any and all materials remaining unsold shall become the property of the co-partners as above provided."

The agreement further provided that plaintiff Batchelor and his wife should deliver to defendant their note for $15,000 secured by a trust deed on their home; that defendant should have the right to foreclose the trust deed in the event of a breach of the agreement or if in his opinion plaintiffs were not diligent in effecting sales; that in the event of plaintiffs' failure to sell sufficient materials to pay defendant the sum of $20,000, defendant at his option might dispose of the materials, apply the proceeds to the payment of sums due him, and hold the plaintiffs for any deficiency. It was further agreed that "Nothing herein shall be construed as creating or establishing a co-partnership between the co-partners and Arthur Mandigo, it being understood and agreed that said Arthur Mandigo is an independent operator purchasing materials through the co-partners for a profit as herein provided."

The trial court found as follows:

That the $15,000 paid by defendant to plaintiffs "was not intended to be a loan, but was entrusted to plaintiffs for the purchase of certain war materials on behalf of the defendant"; that the agreement above set forth "expressed the true intention and agreement between the parties, and that there were no collateral agreements between the parties with reference to said transaction"; that "the plaintiffs agreed to purchase from the defendant his interest in said surplus war materials, at future times, at a higher aggregate price as provided in said agreement".

The court further found: "That since under the terms of said written agreement the materials purchased for defendant with his funds were not to be segregated from materials purchased with plaintiffs' funds, and since plaintiffs were entrusted with all of the materials so purchased until sales were made or until plaintiffs purchased defendant's interest in said materials for the amount provided in said contract, and since it was impractical to warehouse defendant's property in a bonded warehouse, or otherwise satisfactorily to protect his property pending sale, the plaintiffs voluntarily agreed to execute the note and deed of trust referred to in said agreement to secure and guarantee full and faithful performance of said agreement on their part."

[1] Appellants contend that the transaction, although evidenced by an instrument denominated "Warehouse Receipt and Agreement", was in truth a loan, and that "distinctions from a loan are untenable." A "loan" is defined in Milana v. Credit Discount Co., 27 Cal.2d 335, 339, 163 P.2d 869, 871, 65 A.L.R. 621, as "the delivery of a sum of money to another under a contract to return at some future time an equivalent amount with or without an additional sum agreed upon for its use; and if such be the intent of the parties the transaction will be deemed a loan regardless of its form."

"This," urge appellants, "precisely describes the present case. Respondent delivered $15,000.00 against appellants' contract to return $20,000.00 as soon as 80% of sales added up to that amount, but in no event more than twelve months after the receipt of the $15,000.00. The mortgage and security-title make the character of the transaction especially clear, since they are the common incidentals of a well-secured loan."

[2] It has long been established that the courts will pierce the veil of any transaction designed as a cloak to cover the exaction of usurious interest. The substance and not the form of the transaction

is controlling,—the essence of the transaction rather than its trappings. (See authorities cited in Milana v. Credit Discount Co., supra, 163 Cal.2d at pages 340, 341, 163 P.2d at page 872, 65 A.L.R. 621. "No case is to be judged by what the parties appear to be or represent themselves to be doing, but by the transaction as disclosed by the whole evidence, and if from that it is in substance a receiving or contracting for the receiving of usurious interest for a loan or forbearance of money, the parties are subject to the statutory consequences, no matter what device they may have employed to conceal the true character of their dealings." (27 R.C.L. 211.)

Appellants rely heavily upon the Milana case, supra. It is to be noted, however, that the court was there dealing with a judgment entered upon the granting of a nonsuit. The plaintiff, in order to keep her business operating, entered into an arrangement with a loan company which purported to be a sale of accounts receivable, which plaintiff guaranteed would be paid within sixty days. However, as stated in the decision, "In practice, accounts not paid within sixty days from assignment, although in some cases accounts were listed which were not yet due, were turned back to the plaintiff and were 'repurchased' by the defendants under the same agreement, and an additional discount was taken on the so-called repurchases." The court held that the evidence would support a finding that the sale form was used merely as a cover for the real intent; that the trier of fact could reasonably conclude "that the essence of the agreements was the use by the plaintiff of the funds at prescribed rates of interest which were in excess of the constitutional rate".

The situation with which we are here concerned, however, does not precisely parallel that presented in the many cases in which it has been held that the form of the transaction, or the label which the parties put on it, was but a subterfuge to conceal a usurious loan. The facts in the present cause are that plaintiffs had an opportunity to purchase surplus materials which they hoped to resell at a profit. They were not borrowing money in order to keep their business going, as was the situation in the Milana case, supra, nor did the transaction take the form of a purported sale of property owned by them with an agreement to repurchase, to cover what was in fact a pledge to secure a loan. The distinction between the situation presented by a purported sale to the creditor of property owned by the debtor and that of a "sale and resale between different persons" is illustrated in the annotation in 154 A.L.R. 1063, 1079, 1080, which quotes extensively from the case of Stark v. Bauer Cooperage Co., 6 Cir., 1925, 3 F.2d 214 (certiorari denied 267 U.S. 604, 45 S.Ct. 464), 69 L.Ed. 809, which quotations we adopt as peculiarly appropriate to the case before us, as follows:

"An impecunious but optimistic speculator, who finds a property for sale at such a bargain price that he sees a profit of 200 per cent. if he could buy it and hold it awhile, hurries to a moneyed friend, explains the situation, and says, 'If you will buy this from the present owner, and then sell it to me on five years' credit, I will buy it of you at an advance of one-third over what you pay, and make my interest-bearing purchase contract and notes for that total sum.' The friend agrees, and it is done. Later the buyer concludes that the transaction was a usurious loan to him.

"* * * * * *

"So far as we can find, every case in which the existence of an absolute promise by an ostensible vendee to pay the sum involved has been thought to indicate that the transaction was merely a loan instead of having the character in which it was made to appear, is a case where the contract vendee had parted with his recent title and was arranging to get it back again. In no case was the contract one for the purchase of property which he had never before owned. In this class are the numerous cases in which it appeared that the owner, perhaps of real estate or perhaps of the accounts receivable in a going business, was hard pressed for funds to save or to benefit his property, and thereupon went through more or less complete forms of selling his property to another and simultaneously agreed to buy it back at an advanced price. It is not important whether the papers show on their face that this agreement for a repurchase exists or whether that is shown by parol; in either case, in construing the contract, it has seemed that the capital advanced was really a loan secured by the property conveyed, and the capital-recipient's absolute obligation to repay has cut a figure in bringing this conclusion; non constat that the same rule applies when the first and only conveyance is a contract of sale from the one who has furnished the capital and running to a stranger, or when at the beginning of negotiations, the final contract vendee does not own the property, but covets it, and is not hard pressed but avaricious."

See also Austermuhl v. Wotton, 120 Wash. 376, 207 P. 662; Eames v. Hardin, 111 Ill. 634; Powers v. Walrath, 235 Ill. App. 180.

Appellants place stress on the fact that respondent took no risk, but required ample security for the return of his investment and profit in the form of the personal obligations of the appellants and a deed of trust on the home of appellant Mandigo. While these facts are of importance, and perhaps determinative in many types of cases, they are not controlling here. (See authorities immediately above cited.) The language appearing in 154 A.L.R. 1081, in discussing the case of Stark v. Bauer Cooperage Co., supra, is here pertinent: "After pointing out that on both sides the parties were men of large affairs and highly competent to deal at arm's length, and that 'plainly he who would transform this contract into some different one, supposed to be hidden in all these plain terms, carries a heavy burden,' the court said that the transaction, 'in a fair sense, though not in the most common one,' was a joint adventure, B. to furnish the present opportunity and future management for making a large profit, M. to furnish the capital. Rejecting the apprehension of B's counsel and of the court below that if the contract was allowed to stand as written, a highway would be pointed out to evade the beneficent purpose of the usury law, the court concluded: 'When the capitalist and speculator have no existing relations and the speculator has no interest in a property for sale, the agreement that the capitalist will buy the property and carry it for the other and that the speculator will buy it from him at a fixed price is not, ipso facto, a loan.' "

[3] The learned trial judge, in denying a motion to enter another and different judgment, rendered a memorandum decision which in our view effectively disposes of the contention that the transaction was in its essence a loan, and from which we quote in part:

"In the instant case we have a plaintiff who was operating a business out of which he gained an apparently adequate livelihood. There is no evidence that he needed any funds for the operation of the enterprise which was his normal occupation. He saw an opportunity to engage in a new, additional and speculative venture, wholly unassociated with his regular business.

"To obtain the goods for the new speculative venture, for which he had part but not all of the means, he accepted the financial interest of the defendant. Neither the expectancy of a high percentage of profit by both the plaintiff and defendant, nor the fact that the defendant was secure against possible losses, nor the fact that the defendant was to receive the return of his investment (which was larger than the investment of the plaintiff) before the plaintiff obtained his anticipated profit, can change this business relationship into a loan transaction.

" * * *

"The rule set forth in 55 Am.Jur. 342 does indicate to the court a reasonable line of demarkation between a legitimate business venture with the parties unequal in the extent of their risk but equally eager in their anticipation of profit, and a situation in which a necessitous borrower is victimized by a designing usurious lender. It is there suggested that a transaction is likely to be a loan where the recipient of the money parts with title to *property of his own* as security. On the other hand, the transaction is more likely to be a business venture where the money is used entirely for the purchase of *property not theretofore owned by either* of the persons.

" * * *

"In the instant case, the plaintiff did not desire nor require the use of *money* as such. The parties desired, and did, acquire *property*. Had plaintiff used any part of the money entrusted to him by the defendant for any purpose other than the acquisition of the goods from Douglas he would have violated a trust. * * * ."

The judgment and order appealed from are, and each is, affirmed.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; CARTER, J., dissenting.

95 Cal.App.2d 685

LOWE v. LEE.

Civ. No. 14048.

District Court of Appeal, First District, Division 2, California.

Jan. 24, 1950.

Daniel Joseph Lowe sued Mariano Kwongkui Lee to recover for injuries sustained in a collision while riding in an automobile.

The Superior Court of Alameda County, A. J. Woolsey, J., rendered judgment for the defendant, and plaintiff appealed.

The District Court of Appeal, Goodell, J., held that conflicting instructions as to whether the negligence of the driver of the automobile in which plaintiff was riding should be imputed to plaintiff, constituted reversible error.

Judgment reversed.

1. Appeal and error 🔑1064(1)
Trial 🔑243

Instruction that negligence of driver of automobile in which plaintiff was riding was not imputable to plaintiff followed by conflicting instruction that plaintiff could not recover if jury found that driver of automobile was acting as agent of plaintiff, was reversible error, where jury was not instructed as to how driver could become plaintiff's agent and evidence showed that plaintiff was merely being taken home as a friendly gesture.

2. Trial 🔑296(1)

The giving of an erroneous instruction is not cured by the giving of other correct instructions, where the effect is simply to produce a clear conflict in instructions and it is not possible to show which instruction was followed by jury in arriving at verdict.

3. Automobiles 🔑246(60)

In automobile accident case, instruction that any violation of basic speed law was presumptively an act of negligence and conclusively so until rebutted by evidence that it was justifiable or excusable under circumstances, was error, as wrongfully imposing burden on plaintiff to show that such excess speed did not constitute negligence. Vehicle Code, §§ 511, 513.

D. W. Brobst, Oakland, for appellant.

Charles V. Barfield, San Francisco, Franklin A. Plank, San Francisco, of counsel, for respondent.

GOODELL, Justice.

Plaintiff appeals from a judgment rendered pursuant to a verdict for defendant in an action for personal injuries. The injuries resulted from a rear end collision between a Studebaker sedan driven by defendant and a Chevrolet driven by one Chew and in which plaintiff was riding.

Plaintiff was employed as a pianist in a cocktail lounge in San Francisco from 8 p. m. to 12 p. m. Shortly before midnight on May 3, 1947, Chew called for him at the lounge and offered him a ride home across the bay. They drove to a cafe and had dinner, thence across the bay bridge, traveling in the middle eastbound lane.

Defendant, driving his Studebaker toward Oakland and accompanied by his wife, had crossed the bridge in the southerly lane, and while on the level part of the easterly approach between the toll gate and the incline stopped behind a Buick which had stopped behind a stalled car. After 2 or 3 minutes the Buick moved out of the southerly lane into the middle lane and Lee followed one or two car lengths behind. The right front end of Chew's Chevrolet collided with the left rear of Lee's Studebaker just as it had moved into the middle lane, resulting in severe injuries to plaintiff.

Lee testified that before he started up he looked back and saw a car following in the lane next the center line at a distance of 400 or 500 feet, traveling, as he thought, within the speed limit. He gave an arm signal, started up, and did not again look back. Lee testified that after the collision Chew said, "Oh, I didn't even see." Lee's wife corroborated him in all substantial respects.

Plaintiff testified that he saw no signal but first saw the Studebaker ahead at a distance of 100 or 200 feet, and elsewhere he said that as they were traveling in the middle lane "all of a sudden an automobile moved out in front of us" and the collision was "practically simultaneous."

Chew testified that he saw no signal but saw the car 100 or 150 feet ahead turn suddenly into his lane and that he applied his brakes about 75 feet before they struck. He testified that while waiting for plaintiff at the lounge he had a bottle of beer. A half filled bottle of brandy was on the front seat of the car after the collision but Chew said that this was carried in the glove compartment for religious purposes.

Two highway officers testified that Chew's breath was strongly alcoholic, not resembling the odor of beer, and that a statement then given by him, in which he admitted operating his vehicle at 40 miles per hour (which exceeded the limit), was incoherent but that such incoherence was due to his own injury and not to intoxication.

From the foregoing summary it is apparent that there was evidence sufficient to support any one of four conclusions, namely (1) that defendant alone was negligent; (2) that Chew alone was negligent; (3) that defendant and Chew were simultaneously negligent, or (4) that the accident was unavoidable.

Appellant's principal contention is that the giving of conflicting and misleading instructions on imputed negligence and agency was prejudicial error.

In an instruction proposed by plaintiff the jury was told unequivocally "that the driver's negligence, if any, may not be imputed to the plaintiff * * *"

Later, on the court's own motion the jury was instructed that any negligence of the driver "is not imputable to or chargeable against said plaintiff, nor is he in any manner, *except as otherwise herein instructed*, to be considered by you as legally responsible therefor * * *"

The phrase just emphasized by us created a conflict since the jury had been already told in effect that imputed negligence was not in the case.

Then the exception to which the jurors had been thus alerted was given them in this instruction proposed by defendant: "if you find * * * Chew was driving and controlling his automobile at the time of this collision as the agent of plaintiff Lowe, and if you further find that he was driving and controlling said automobile in the course and scope of his agency, then any negligence on the part of * * * Chew is imputed to and in law becomes the negligence of the plaintiff * * *"

Incidentally, the jurors were not instructed as to how or in what manner Chew could have become plaintiff's agent or as to the meaning of "the course and scope of his agency."

It is true that defendant pleaded plaintiff's contributory negligence by alleging that plaintiff and Chew were engaged in a joint enterprise; that both had the joint right of control, and control of the operation of the automobile and that Chew was the agent of plaintiff in such operation, but there was no evidence to prove that the control or right of control of Chew's car reposed in anybody but Chew. Chew testified:

"Q. * * * what was your purpose in coming in there at that time? A. Well, I come in there to take him home, see. At that time I was living on this side, too, every once in a while I made a practice of taking him home on this side, taking him over there and taking him over to this side." Further:

"Q. Now, was Mr. Lowe paying for the ride or buying any gasoline or anything of that kind? A. Oh no, we never do that.

"Q. You were just taking him home as a friend? A. Oh yes, sure".

Appellant testified that he did not drive an automobile and never had driven one; that his eye-sight was impaired by cataracts which affliction was congenital. He testified:

"Q. Did you have anything to do with the operation of the automoble that night? A. No sir * * *

"Q. How come that you were riding in Mr. Chew's automobile that night? A. Mr. Chew came in and said that he was going back to the Brookfield Central Market and that he would be very glad to take me with him as far as my house.

"Q. Had he taken you home on other occasions? A. Oh, yes, some times before." The foregoing was the only evidence touching appellant's connection with the car.

In the recent case of Edwards v. Freeman, 34 Cal.2d 589, 212 P.2d 883, 884, a son while driving his mother down town for an eye examination had a collision in which she was injured. She sued the driver of the other vehicle who urged the defense that the son was his mother's agent and that his negligence was imputable to her. After summarizing the evidence relied on to show agency the court said: "To permit a finding of agency upon this evidence would be, in effect, to hold that one who performs a mere favor for another, without being subject to any legal duty of service and without assenting to any right of control, can be an agent. This is not the law. [Citations.] In the absence of the essential characteristic of the right of control, there is no true agency and, therefore, no 'imputation' of the driver's negligence to the passenger [citations]."

This language is perfectly applicable to the evidence in the instant case.

To the authorities cited in that case, the following might be added: Spence v. Fisher, 184 Cal. 209, 212, 193 P. 255, 14 A.L.R. 1083; Buelke v. Levenstadt, 190 Cal. 684, 689, 214 P. 42; Pope v. Halpern, 193 Cal. 168, 174-175, 223 P. 470; Kelley v. Hodge, Transportation System, 197 Cal. 598, 603, 242 P. 76; Peccolo v. City of Los Angeles, 8 Cal.2d 532, 538, 66 P.2d 651; Walker v. Adamson, 9 Cal.2d 287, 290, 70 P.2d 914 and Campagna v. Market Street R. Co., 24 Cal.2d 304, 149 P.2d 281.

[1] The following language in the Edwards case likewise applies here with equal force: "The verdict may have resulted from the tenable view of the evidence that defendant was not guilty of negligence proximately causing the collision, or it may have resulted from the also tenable view of the evidence that simultaneous negligence of both drivers caused the collision, coupled with the untenable view of the law, upon this record, that Ray's [substitute Chew's] negligence could be 'imputed' to bar plaintiff's recovery." Accordingly, we must follow that case in holding that "it was error to submit the issue of imputed negligence to the jury and the error was clearly prejudical because the inadequate and confusing instruction on the subject of agency at the least *permitted* the jury to find such a relation (if it be not understood as directly suggesting such a conclusion) * * *."

There is a factor in this case not present in the Edwards case, which aggravates the error of the agency instruction. It is the direct conflict between that instruction and the one which told the jury without qualification that there was no imputed negligence in the case.

[2] In Akers v. Cowan, 26 Cal.App.2d 694, 699, 80 P.2d 143, 145, the court said: "It has been frequently held that the giving of an erroneous instruction is not cured by the giving of other correct instructions, where the effect is simply to produce a clear conflict in the instructions and it is not possible to know which instruction was followed by the jury in arriving at a verdict." Citing inter alia Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 201 P. 599. The

Akers case was followed in Westberg v. Willde, 14 Cal.2d 360, 369-371, 94 P.2d 590.

Respondent invokes the rule that the instructions must be read as a whole and cites a group of cases holding "that, even though the evidence may not be sufficient to sustain a cause of action or defense to which an instruction applies, a reversal may not be had upon that ground if the evidence as to other causes of action or defenses is sufficient to sustain the verdict", Brandes v. Rucker-Fuller Desk Co., 102 Cal.App. 221, 228, 282 P. 1009, 1012, and "that in order to warrant the giving of an instruction it is not necessary that the evidence upon the issue be clear and convincing; it being sufficient if there be 'slight' or 'some' evidence upon that issue." 102 Cal.App. at page 227, 282 P. at page 1012. Those cases are not in point because here the conflicting instructions made it impossible "to know which instruction was followed by the jury", Akers case, supra, and because "there was no evidence whatever upon which the instructions complained of were based." Brandes case, 102 Cal.App. at pages 228–229, 282 P. at page 1012.

[3] Appellant, relying on Westberg v. Willde, 14 Cal.2d 360, 369–371, 94 P.2d 590, supra, also contends that there was prejudicial error in the giving of the instruction "that any violation of the provisions of the Vehicle Code * * * to be read to you shortly, unless otherwise therein provided, is presumptively an act of negligence, and conclusively so until rebutted by evidence that it was justifiable or excusable under the circumstances."

The court then read the basic speed law, § 510, Vehicle Code, and immediately thereafter instructed the jury "that on that portion of the bridge approach or highway where the * * * collision * * * occurred a prima facie limit of 35 miles per hour was applicable."

Chew admitted going 40 miles per hour *which was a violation,* hence the instruction in broad terms as to *any* violation placed the burden of exculpation on him. Section 513, Vehicle Code, however, provides that: "*Exceeding Prima Facie Limit Not Negligence as Matter of Law.* In any civil action proof of speed in excess of any prima facie limit declared in section 511 hereof at a particular time and place shall not establish negligence as a matter of law but in all such actions it shall be necessary to establish as a fact that the operation of a vehicle at such excess speed constituted negligence." It is true the court did not read the second paragraph of section 511 to the jury (as was done in theWillde case) but it would seem that the instruction that *any* violation was presumptive negligence was just as harmful as if 511 had been read since it placed the burden on the wrong party. It is not necessary to decide this question, but in anticipation of a second trial it is proper to say that the instruction appears to be an incorrect statement of the law.

Appellant also complains of the instruction which, after telling the jury that the negligence of Chew was not imputable to his guest, the plaintiff ("except as otherwise herein instructed") went on to say that "Such rule, however, does not allow the passenger or guest to shut his eyes to danger in blind reliance upon the unaided care of another without consulting the consequences of the omission of such care, if any." It is not necessary to decide this question but it would seem that there was nothing in the case to warrant the part of the instruction last quoted.

The judgment is reversed because of the conflicting instructions first discussed herein.

NOURSE, P. J., and DOOLING, J., concur.

95 Cal.App.2d 824

RIZZO v. COLLOSI et al.

Civ. 17214.

District Court of Appeal, Second District,
Division 1, California.
Jan. 31, 1950.

Angelo Rizzo sued Domenick Collosi and Mary Collosi to recover rent overcharges and for a declaration that plaintiff had a valid lease for a term of three years.

The Superior Court of Los Angeles County, George Francis, J., rendered judgment for the plaintiff, and defendants appealed.

The District Court of Appeal, Doran, J., held that the lessor could not deny the existence of a valid lease on the ground that it violated the Housing and Rent Act.

Judgment affirmed.

War and national defense 🔑210

Where lessee paid lessor rent for first and last two months of three year term, painted portion of leased premises in accordance with agreement and painted other portion voluntarily, lessor could not deny validity of lease on ground that it violated Emergency Price Control Act, notwithstanding payments made and work done thereunder constituted a rent overcharge. Housing and Rent Act of 1947, § 206(a), 50 U.S.C.A.Appendix, § 1896(a).

◆

Barry Sullivan, Los Angeles, for appellants.

Sidney Fischgrund, Los Angeles, for respondent.

DORAN, Justice.

On June 1, 1947, the appellant Collosi, owner of two houses described as 3843 and 3843½ Whittier Boulevard, in Los Angeles, leased said property to the respondent Rizzo for a three-year term, at a rental of $85 per month. Respondent tenant paid $230 as rental for the first month and the last two months of said term. There was a memorandum in the form of a rent receipt evidencing the transaction.

The respondent's complaint seeks a declaration of rights and "a determination that the plaintiff has a good, valid and existing lease for the term of three years"; treble damages for alleged rent overcharge, and attorney fees. It is alleged that plaintiff paid to defendant the sum of $330 over and above the lawful rental for said housing accommodations. The complaint also alleges that "as additional consideration for the leasing", plaintiff painted the outside and inside of the houses, the reasonable value of labor and materials being $750.

The answer of Domenick Collosi denies all allegations; an answer by Mary Collosi sets up joint ownership with Domenick Collosi, and alleges that No. 3843 Whittier Boulevard was decontrolled by the OPA on March 2, 1948. It is further alleged that on March 15, 1948, defendants served a month's notice to quit on the plaintiffs but that the latter have not vacated said premises. As to No. 3843½ Whittier Boulevard, it is alleged that plaintiff does not occupy same and that same had been sublet by plaintiff to one Llewellyn F. Card. Said answer prays that plaintiff be adjudged to have no interest in the premises.

The trial court found, as stated in appellants' brief, that the property was leased as alleged for three years; the front premises known as 3843 Whittier Boulevard, renting for $55 per month, and the rental for the back premises known as No. 3843½, being $30; that defendant was paid $230 for the first and last two months, and was allowed $25 because 3843½ was not completed and ready for occupancy. It was further found that plaintiff painted No. 3843 at a cost of $200; that 3843½ was voluntarily painted by the plaintiff without obligation.

The court also found that the defendant received $15 over and above the lawful rental for No. 3843, and that the reasonable cost of the painting, namely $200, was in the nature of a bonus, making the total rental overcharge $215. The trial court concluded "That the plaintiff has a valid lease * * * for a term of three years", as alleged denied treble damages and gave judgment for plaintiff "in the sum of $215.00 as excess rent and bonus charged and collected over and above the legal maximum rent for the premises at 3843 Whittier Boulevard", together with $75 for attorney fees.

Appellants brief frames the question involved as follows: "may the Court declare a lease for a period of three years, and at the same time hold that the lease is in violation of the Emergency Price Control Act"? In the respondent's brief the question is thus stated: "Whether or not the owner * * * who, * * * offers to lease the premises for a term of three years upon the condition that the tenant pays the first and last two months rent * * * and provided the tenant furnish all work and labor for painting * * * and who extracts the first and last two months' rent * * * and permits the tenant to take possession and make said improvements, can deny the existence of a valid lease on the ground that it is in violation of the Emergency Price Control Act * * * where the tenant did not know that the premises were subject to rent control and the landlord did not disclose that fact * * * until after suit was brought by the landlord to evict the tenant?"

In Paragraph VI of plaintiff's First Cause of Action, among other things it is alleged "That the defendant should be estopped from claiming that the plaintiff does not have a valid lease for the term of three (3) years from June 1, 1947". This allegation the trial court found to be true. There is no transcript of the testimony but from the briefs of the respective parties it appears that there is no material conflict in the evidence.

In the language of respondent's brief, it may be said that "The Court properly enforced a contract against the defendants, who, as landlords, attempted to take advantage of their own illegal act, and in favor of the plaintiff for whose protection the particular statute was enacted". Having secured the first and last two months' rent and the benefits of painting improvements furnished by the plaintiff in the reasonable belief that occupancy was assured for the stipulated term of three years, the defendants then sought to eject plaintiffs and to avoid the lease.

Illegality of the lease by reason of violation of Section 206A of the Rent Control Law, 61 Stat. 199, 50 U.S.C.A.Appendix, § 1896(a), making it unlawful "to offer, solicit, demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent", is offered as a reason for reversal of the judgment in plaintiff's favor. That the Rent Control Law was not designed to accomplish such result at the hands of a landlord who has exacted excessive rent, seems obvious.

In respect to the fundamental principle involved the present situation is not unlike that of Beverly Hills Nat. Bank & Trust Co. v. Seres, 76 Cal.App.2d 255, 261, 172 P.2d 894, 897, where it appeared that a tenant had paid money to a former occupant in order to secure earlier possession and had made substantial improvements in reliance on a representation of plaintiff's grantor that the premises would be leased for a five-year term. The appellate court there held that such facts "would warrant application of the doctrine of equitable estoppel so as to foreclose * * * (reliance) upon the statute of frauds to support a claim that no valid five-year lease had been entered into".

Appellants' complaint that the trial court did not make findings in respect to material issues is specious and not supported by the record. The contention that the court did not find that the property in question was used as "residence" property is, as respondent points out, answered by the fact that both pleadings and findings refer to the premises as "housing accommodations", which is the term used in the Rent Control Law. Appellants' briefs present no meritorious cause for reversal.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

95 Cal.App.2d 827

REITES et al. v. WILKERSON et al.

Civ. 17637.

District Court of Appeal, Second District,
Division 1, California.
Jan. 31, 1950.

Rehearing Denied Feb. 6, 1950.

Hearing Denied March 30, 1950.*

Petition by Jennie Reites and James Reites, Jr., against Russell B. Wilkerson and others and Walter C. Peterson, as City Clerk of the City of Los Angeles, for a writ of mandate directing the City Clerk to examine certain recall petitions to determine whether they are signed by the requisite number of qualified electors and certify results of such examination to the City Council.

The District Court of Appeals, in a per curiam opinion, overruled the demurrer of City Clerk to the application.

Peremptory writ directed to issue.

1. Municipal corporations ⚿63(1)

A recall in a chartered city is a municipal affair, and the City Clerk is the exclusive judge of the sufficiency of recall petitions in all particulars, and courts are excluded from inquiry concerning them.

2. Mandamus ⚿74(2)
Municipal corporations ⚿159(1)

The City Clerk in a chartered city must determine the sufficiency of recall petitions impartially and if he acts fraudulently or arbitrarily, his action may be controlled by mandamus.

3. Municipal corporations ⚿108.5

Statutory or charter provisions dealing with referendum should be liberally construed.

4. Municipal corporations ⚿159(1)

The City Clerk's duties in determining sufficiency of recall petitions are purely ministerial, and under the law he should exercise his powers and perform his duties in such a manner as will, whenever possible, protect rather than defeat the right of the people to exercise their referendary powers.

5. Municipal corporations ⚿159(1)

To rule out names of qualified voters on petition to recall mayor solely because of failure to properly certify them when such failure may be corrected in the office of the City Clerk, constitutes an arbitrary exercise of ministerial powers and the Superior Court is without power to direct the clerk not to count such names.

6. Municipal corporations ⚿159(1)

The provision of the Los Angeles City Charter that the City Clerk shall within 20 days from the date of filing a recall petition examine it and ascertain whether it is signed by the requisite number of qualified electors of the city and shall certify the result of the examination of the City Council is directory only.

7. Municipal corporations ⚿159(1)

The rights of persons signing recall petitions are not destroyed by the refusal of the City Clerk to act upon such petitions within the 20 days prescribed by charter and where the City Clerk had failed to proceed within such time he should proceed to examine petitions for recall in the same manner as if he had begun the examination within such time and certify the results of such examination to the City Council.

8. Municipal corporations ⚿159(1)

If by certificate of City Clerk of City of Los Angeles petition for the recall of mayor is found to be insufficient it may be amended by filing a supplemental petition or petitions within 10 days from the date of such certificate.

Enger & Hiller, Los Angeles, for petitioners.

Ray L. Chesebro, City Attorney, Bourke Jones, Assistant City Attorney, and Roger Arnebergh, Assistant City Attorney, Los Angeles, for respondent City Clerk.

PER CURIAM.

This is an original proceeding in this court against the city Clerk of the City of Los Angeles to compel him to examine certain recall petitions to determine whether the same are signed by the requisite number of qualified electors and certify the results of such examination to the City

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* Subsequent opinion 223 P.2d 48.

Council. Respondent City Clerk has filed a demurrer and answer to the petition filed herein.

It is agreed that to call an election for the recall of Mayor Fletcher Bowron of Los Angeles, it is necessary to have upon the petition therefor at least 89,497 names, qualified in accordance with the provisions of the City Charter. A petition for recall was filed containing 129,662 purported signatures. The petition consisted of 1,743 sections.

Five hundred ninety-three of these sections were declared invalid by the Superior Court, which by its judgment directed the City Clerk not to count the 50,734 names thereon. Subtracting 50,734 from 129,662 leaves 78,928 names, or not enough to call the election.

The sections ruled out appeared to be proper as to form. They were adjudged insufficient because the affidavits of the persons circulating the petitions failed to certify them in accordance with the provisions of the City Charter.

[1] A recall in a chartered city is a municipal affair. Muehleisen v. Forward, 4 Cal.2d 17, 46 P.2d 969.

The City Clerk is the exclusive judge of the sufficiency of recall petitions in all particulars and courts are excluded from inquiry concerning them. Baines v. Zemansky, 176 Cal. 369, 168 P. 565.

[2] Of course, the duty of the City Clerk is to be performed impartially and if done fraudulently or arbitrarily, his action may be controlled by mandamus. Tilden v. Blood, 14 Cal.App.2d 407, 58 P.2d 381.

[3-5] The controlling rule in such cases as this is stated in Ley v. Dominguez, 212 Cal. 587, at pages 593 and 602, 299 P. 713, at pages 715:

"* * * to protect the people of this state in the exercise of this reserved legislative power, statutory or charter provisions dealing with the referendum should be afforded the same liberal construction afforded election statutes generally.

* * * * * *

"* * * It must be remembered that his (the City Clerk's) duties are purely ministerial and not judicial. Under the law, he should exercise his powers and perform his duties in such a manner as will, whenever possible, protect rather than defeat the right of the people to exercise their referendary powers."

To rule out names of qualified voters solely because of failure to properly certify them, when such failure may be corrected, in the office of the City Clerk, constitutes an arbitrary exercise of ministerial powers. And the Superior Court is without power to direct the clerk not to count such names.

[6-8] While the provisions of the City Charter (Secs. 273; 290, sub. B) provide that within twenty days from the date of filing a recall petition, the City Clerk shall examine the same and ascertain whether or not said petition is signed by the requisite number of qualified electors of the city, and shall certify the result of the examination to the City Council, such provisions are directory only, Schaefer v. Herman, 172 Cal. 338, 344, 155 P. 1084. The rights of the persons signing the petitions are not destroyed by the refusal of the City Clerk to act upon such petitions within the time prescribed. It is the duty of the City Clerk to proceed now to examine the foregoing petitions in the same manner as if he had begun the examination within the twenty days provided by the Charter and to certify the results of such examination to the City Council. And if by said certificate of the City Clerk the petition for the recall of the Mayor of the City of Los Angeles is found to be insufficient, "it may be amended by filing a supplemental petition or petitions within ten days from the date of such certificate" (Los Angeles City Charter, supra).

The demurrer of respondent City Clerk is overruled and it is therefore ordered that a peremptory writ of mandate issue:

(a) Directing the City Clerk to permit the sponsors of the recall petitions to affix a notarial jurat, and to make such other clerical corrections of the same, if they can, as will conform to the provisions of the City Charter. For this purpose, however, none of said petitions are to be removed from the custody of the City Clerk.

(b) And when any of said petitions are properly certified, to determine whether the names thereon comply with the provisions of the City Charter, and if so, to count them for the purposes of the proposed recall election.

(c) And to certify the result of such examination to the City Council in conformity with the foregoing provisions of the Charter.

(d) That in the event such certification taken in conjunction with the previous certification made to the City Council shows the entire recall petitions to contain less than the requisite number of qualified electors of the City of Los Angeles, to permit, within ten days after such certification, the filing of a supplemental petition or petitions in conformity with the Charter provisions.

Hearing denied; SHENK, J., dissenting.

95 Cal.App.2d 736

ACQUISTO v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 17086.

District Court of Appeal, Second District, Division 3, California.

Jan. 26, 1950.

Action by Anthony Acquisto against Bank of America National Trust and Savings Association, a national banking association, to recover damages for refusal to surrender ownership certificates and release a lien on automobiles upon tender by plaintiff of amount of lien indebtedness.

The Superior Court of Ventura County, Louins C. Drapeau, J., entered judgment for plaintiff and defendant appealed.

The District Court of Appeal, Shinn, P. J., held that title to automobiles had been transferred to plaintiff on condition that he satisfy lien indebtedness thereon and that defendant's refusal to recognize transfer and surrender ownership certificates and release lien upon tender by plaintiff of amount of indebtedness gave plaintiff a cause of action for damages against defendant, even though owner retained possession of automobiles.

Judgment affirmed.

1. Sales 🔑459

Acceptance by plaintiff of used car dealer's offer to transfer title to five automobiles to plaintiff if he would pay indebtedness for which bank held a lien on them, agreement by plaintiff to pay indebtedness and execution and delivery of bills of sale of automobiles and trust receipts effected a conditional transfer of title to plaintiff which dealer could not rescind and which would become absolute upon satisfaction of lien by plaintiff.

2. Automobiles 🔑20
Chattel mortgages 🔑219

Provision in trust receipt that automobiles could be sold with consent of lienholder did not entitle lienholder to refuse to surrender ownership certificates to debtor upon payment of lien or prevent debtor from transferring to third party debtor's right to satisfy the lien and receive the certificates of ownership.

3. Liens 🔑23

Where lienholder refused to recognize transfer of title to automobiles by owner and surrender ownership certificates upon tender by transferee of amount of indebtedness, lienholder was liable for damages to transferee and could not escape liability on ground that transferee's damage was occasioned by owner's refusal to surrender possession of automobiles, since had ownership certificates been surrendered to transferee, he could have sold automobiles and either he or buyer could have obtained possession through legal process.

4. Torts 🔑22

If the wrongful acts of two persons contribute proximately to cause damage to a third person, neither of the wrongdoers can shift the entire responsibility to the other.

Hugo A. Steinmeyer, Geo. L. Beckwith, Los Angeles, for appellant.

Gustafson & Rosenmund, Roy A. Gustafson, Oxnard, for respondents.

SHINN, Presiding Justice.

In March of 1948, Charles C. McIntosh was in the used car business in Ventura. Plaintiff was engaged separately in the same business. McIntosh then had five automobiles in stock, upon which the Bank of America had a lien as security for the payment of $3,665.50. The bank held the ownership certificates and two so-called trust receipts signed by McIntosh, one covering four cars and the other one car. McIntosh held a copy of the four car receipt to which had been added a description of the fifth car. The purport of these writings was that McIntosh retained possession of the cars as trustee for the bank, and was authorized to sell them and receive the certificates of ownership upon payment of stipulated amounts upon the indebtedness. Being in financial difficulties, McIntosh proposed to plaintiff that he assume the indebtedness to the bank and take title to the five cars. The court found that on or about March 11, 1948, McIntosh assigned to plaintiff all his right, title and interest in and to said automobiles and his rights as trustee in and to said trust receipt; that on the same day plaintiff notified defendant of said assignments, exhibited to defendant a bill of sale of the cars, and a written authorization from McIntosh directing defendant to accept from plaintiff the amount of its lien and to surrender to plaintiff the certificate of ownership for each of them; that plaintiff tendered to defendant the amount of the indebtedness and demanded the certificates of ownership properly endorsed; that defendant refused to deliver said certificates or to release its lien; and that plaintiff was thereby damaged in the sum of $1,534.50. The cars were found to have a retail value of $6,875, and a wholesale value of $5,200. The damages were fixed at the difference between the wholesale value and the amount of the indebtedness to the bank. Defendant appeals.

The bank throughout has relied upon the admitted fact that before plaintiff tendered the amount of the indebtedness it had been notified by McIntosh not to accept payment from plaintiff or deliver to him the ownership certificates. Two points are made on the appeal, (1) that there was no effective transfer to plaintiff of the interest in the cars which was vested in McIntosh under his arrangement with the bank, and (2) that the refusal of the bank to accept payment of the debt and surrender the ownership certificates was not a proximate cause of any damage suffered by plaintiff.

It is said in the opening brief, "there was no attempt to transfer or assign any right, title or interest in or to the automobiles or ownership certificates." It is also said that the negotiations between plaintiff and McIntosh amounted only to an offer by the latter to transfer title to the cars after plaintiff had satisfied the indebtedness to the bank. McIntosh, it is said, revoked his offer by notifying the bank, prior to plaintiff's tender, not to accept payment of the indebtedness or deliver the ownership certificates to plaintiff.

[1] The arrangement between McIntosh and plaintiff took place in the evening of March 10th. Plaintiff testified that McIntosh offered to give him title to the cars if he would pay off the bank and that he agreed. McIntosh then executed and delivered to plaintiff bills of sale of each of the cars, dated March 11th, and delivered to him the so-called trust receipt and five signed authorizations to the bank to accept the amount of the indebtedness on the cars and to cancel the insurance. A witness, Jensen, who was present, testified that after McIntosh had stated his terms plaintiff said "O. K. it is a deal" and that thereafter the witness drew the bills of sale, the directions for payment to the bank which were then signed by McIntosh and, together with the trust receipt, were handed to plaintiff. The testimony of McIntosh was corroborative of the foregoing, although he testified that plaintiff agreed to share equally with him any net profits made on the sale of the cars. There was sufficient evidence to prove that the agreement

consisted of an offer made by McIntosh which was accepted by plaintiff, followed by the delivery and acceptance of the bills of sale and other instruments. It was shown by unconflicting evidence that plaintiff at the time agreed to pay the indebtedness to the bank and that he was to be given possession of the cars as soon as he had paid off the bank and received the ownership certificates. It seems to us that the parties did all that was required to evidence a binding agreement. They were careful to respect the rights of the bank. The bills of sale recited that the cars were transferred free and clear of encumbrance. They were effective as a conditional transfer of title to plaintiff which would become absolute when plaintiff complied with the condition. Plaintiff accepted them, and in so doing confirmed his obligation to satisfy the lien of the bank before he would have the right to possession of the cars. McIntosh had no right to repudiate or rescind the transaction.

[2, 3] Appellant calls attention to a provision in the trust receipt that the cars could be sold "with the consent of the bank" and says that it did not consent to the sale. It is not suggested, however, that it would have had any right to withhold consent to a sale or to refuse to surrender the ownership certificates to McIntosh upon payment of the amount of its lien. Neither is it contended that McIntosh could not transfer to plaintiff the same right to pay off the debt and satisfy the lien. It is contended only that no effective transfer was made, and in this, as we have seen, the bank was mistaken. Both McIntosh and the bank acted under the erroneous belief that no effective agreement had been made with plaintiff. The evidence, as we have seen, was to the contrary, and upon the findings on that issue the refusal of the bank to recognize the agreement gave plaintiff a cause of action for damages.

It has been mentioned that McIntosh testified that plaintiff agreed to give him one-half the profits when the cars were sold. While the findings do not state the terms of the agreement, it is clear, when they are considered as a whole, that the court did not accept the testimony of McIntosh on this point.

It is also to be noted that the court found the retail value of the cars to be $6,875, and the "wholesale" value $5,200. The finding as to the wholesale value was based upon evidence as to what the five cars would have brought on the market if offered to dealers in used cars. Since plaintiff has not appealed the question does not arise whether he was entitled to have his damages computed on the basis of what the cars would have brought at retail.

[4] Appellant's final contention is that, assuming the agreement was made, as the court found, plaintiff's damage was occasioned by the refusal of McIntosh to perform upon his part. It is said that even if the bank had surrendered the certificates of ownership plaintiff could not have made effective sales of the cars if McIntosh refused to surrender possession of them and that it is clear he had no intention to do so. The obvious answer to this contention is that if the bank had surrendered the ownership certificates, title to the cars would have stood in plaintiff, and he would have been in a position to sell them and transfer title. If, under those circumstances, McIntosh had refused to surrender possession, which perhaps is doubtful, plaintiff or his assignees could have gained possession through legal process. If the wrongful acts of two persons contribute proximately to cause damage to a third person, neither of the wrongdoers can shift the entire responsibility to the other. DeCorsey v. Purex Corporation, 92 Cal.App. 2d 669, 207 P.2d 616.

The judgment is affirmed.

VALLÉE, J., concurs.

WOOD, J., deeming himself disqualified, does not participate herein.

95 Cal.App.2d 676

PEOPLE v. KASUNIC.

Cr. 4396.

District Court of Appeal, Second District,
Division 2, California.
Jan. 23, 1950.

George Joseph Kasunic was convicted in the Superior Court of Los Angeles County, Clement D. Nye, J., for taking indecent liberties with his minor stepdaughter and stepson, and he appealed.

The District Court of Appeal, Wilson, J., held that defendant's wife was a competent witness against defendant and that the stepchildren's testimony, corroborated in part by defendant's admission, was sufficient to sustain conviction and should not be rejected on the ground that they were coached by a deputy sheriff.

Judgment affirmed.

1. Witnesses 🔑53(3)

Taking of indecent liberties with minor child is "criminal violence" within statute permitting one spouse to testify against the other in case of criminal violence on child of one of them by the other. Pen.Code, §§ 288, 1322.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Criminal Violence".

2. Witnesses 🔑53(3)

The phrase, "upon the child or children of one by the other," in statute permitting one spouse to testify against the other in case of criminal violence on one of them by the other or upon the child or children of one by the other, does not mean that child must be issue of both spouses. Pen. Code, § 1322.

3. Infants 🔑20

In prosecution for taking indecent liberties with defendant's seven year old stepdaughter and his 10 year old stepson, such children's detailed testimony as to defendant's acts, partly corroborated by his admission, was sufficient to sustain conviction, notwithstanding some discrepancies concerning dates, where such testimony was not so insubstantial or inherently unbelievable or improbable as to constitute no evidence. Pen.Code, §§ 288, 288a.

4. Criminal law 🔑1159(3)

The fact that testimony discloses unusual circumstances or contains inconsistencies or contradictions does not warrant rejection thereof by reviewing court.

5. Infants 🔑20

Minor children's testimony against their stepfather in his prosecution for taking indecent liberties with them should not be rejected on ground that they were coached by deputy sheriff, where he told them to recite exactly what happened and to tell the truth and defendant did not contradict anything said during deputy's interrogation of children in defendant's presence, nor deny charges. Penal Code, §§ 288, 288a.

◆

Gladys Towles Root, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Dan Kaufmann, Deputy Attorney General, for respondent.

WILSON, Justice.

Defendant was found guilty on four counts of violation of section 288 of the Penal Code, offenses committed upon his stepdaughter, and one count of violation of section 288a, an act committed upon his stepson, both being minors under the age of 14 years. He has appealed from the judgment of conviction.

[1] Defendant's wife, mother of the two children, was called as a witness by the prosecution and was permitted to testify over defendant's objection that she was not a competent witness against her husband by reason of the provisions of section 1322 of the Penal Code.* Among the exceptions permitting one spouse to testify against the other in a criminal action are "in cases of criminal violence

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* Section 1322 reads as follows: "Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with the consent of both, or in case of criminal actions or

upon one by the other, or upon the child or children of one by the other." An act of taking indecent liberties with a child, punishable under section 288, is one of "criminal violence." People v. James, 9 Cal.App.2d 162, 164, 48 P.2d 1011.

The competency of a wife to testify against her husband must be determined upon the interpretation to be given to reservatory language in section 1322.

[2] Defendant contends that the phrase "upon the child or children of one by the other" means that the child must be the issue of one spouse by the other spouse—in other words, says defendant, the child must be the issue of both spouses. Such a construction does violence to the intent and purpose of the statute and is contrary to grammatical construction. Section 1322 since its adoption in the original code of 1872 and in all amendments thereof has carried the words "in cases of criminal violence upon one by the other." Amdts. to codes 1873–4, p. 451; stats. 1905, ch. 139, p. 140; stats. 1907, ch. 230, p. 290; stats. 1911, ch. 103, p. 270; stats. 1933, ch. 109, p. 565. The 1933 amendment added after the above quoted words "or upon the child or children of one by the other."

The Legislature intended from the beginning that one spouse should be a competent witness against the other in cases of "criminal violence," first, "upon one by the other," and later upon a child "of one by the other." Both the intent of the Legislature and grammatical construction lead to but one conclusion, to wit, that one spouse should be permitted to testify against the other when a criminal act is charged to have been committed by one spouse upon the child of the spouse who is called to testify. The meaning is clear. The antecedent of the phrase 'by the other" is "criminal violence," and the antecedent of the words "of one" is the phrase "upon the child or children." The meaning is the same as if the section reaa: 'In cases of criminal violence committed (1) by one spouse upon the other, or (2) upon the child or children of the other." While this statute is in derogation of the common law rule that one spouse was not a competent witness against the other in any case, the language cannot be given such a strained construction as would result in a miscarriage of justice and in rejecting a spouse's testimony in a case in which the defendant is not the parent of the child on which the offense was committed and admitting it if he or she is its parent. There can be no logical reason for holding that in a case such as this the mother of the children should not be permitted to testify because her husband, the defendant, is not the father of the children offended against and that she would be a competent witness if the defendant charged with the crime against them were their father.

In Ohio the statute provides that one spouse may testify against the other in a criminal case when the charge involves cruelty to "their children." Ascribing to those words their ordinary meaning, the court held that the term "child" includes stepchild and the statute applies in a case involving a stepchild. Ohio v. Strome, 26 Ohio N.P., N.S., 406.

[3, 4] Defendant's only other contention is that the evidence is insufficient to sustain the judgment of conviction. It will serve no purpose to relate the evidence describing the acts as told by the children. The girl involved was seven years of age and the boy was ten. The court qualified them and determined that they were of sufficient age and intelligence to be competent witnesses. They testified in detail to the acts done by defendant which are in violation of the cited code sections. There were some discrepancies in their testimony concerning dates but no more so than in many instances in evidence given by adults.

proceedings for a crime committed by one against the person or property of the other, whether before or after marriage or in cases of criminal violence upon one by the other, or upon the child or children of one by the other or in cases of criminal actions or proceedings for bigamy, or adultery, or in cases of criminal actions or proceedings brought under the provisions of section[s] 270 and 270a of this code or under any provisions of the 'Juvenile Court Law.' "

They were thoroughly cross-examined and questions were asked by the trial judge. Their evidence is not "so insubstantial or so inherently unbelievable or improbable as to constitute no evidence at all" People v. Montanez, 93 Cal.App.2d 493, 209 P.2d 151, 153, and is not so inherently improbable as to warrant an appellate tribunal in setting aside the conclusion and judgment of the trier of facts. People v. Campbell, 80 Cal.App.2d 798, 800, 182 P.2d 626. Testimony which merely discloses unusual circumstances, or even that which contains inconsistencies or contradictions, does not warrant the rejection of such evidence by a reviewing court. People v. Lucas, 16 Cal.2d 178, 181, 105 P.2d 102, 130 A.L.R. 1485; People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758; People v. Westek, 31 Cal.2d 469, 472, 190 P.2d 9.

[5] Defendant's assertion that the evidence of the minor children should be rejected on the ground that they were coached by a deputy sheriff is without foundation. The deputy had interviewed them on two or more occasions before the trial and had told them to recite exactly what happened and to tell the truth. One of the interviews was in the presence of defendant and it does not appear that he contradicted anything that was said during the interrogation. On one occasion when a deputy sheriff, defendant and his wife were present the latter said to defendant, "why don't you tell the truth to the officers? You know that those youngsters couldn't make up a story like that." Defendant did not deny the charges but replied, as testified by the deputy sheriff, that he could not admit anything like that because "if he went up on that kind of a charge it would be real tough on him." (Defendant was accused in the information of conviction of three prior felonies, two of which the court found to have been committed.) In testifying on his own behalf defendant, while denying the charges made against him, admitted going to Lake Encanto with his stepdaughter, the place where one of the offenses is alleged to have taken place, and taking the children to a picture show and stopping at a street intersection where the offense upon his stepson is alleged to have occurred, to that extent corroborating the evidence of the minor children.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

95 Cal.App.2d 648

CITY & COUNTY OF SAN FRANCISCO v. MARKET STREET RY. CO. et al.

No. 14008.

District Court of Appeal, First District, Division 1, California.

Jan. 20, 1950.

Rehearing Denied Feb. 18, 1950.

Hearing Denied March 21, 1950.

Action by the City & County of San Francisco, a municipal corporation, in its own right, and for the benefit of all persons possessing causes of action against the Market Street Railway Company and others to restrain payment by the named defendant of certain monies paid to it by the City of San Francisco as the balance due for the purchase of all of the named defendant's operative properties.

The Superior Court, City and County of San Francisco, Edward P. Murphy, J., denied the defendant's motion to vacate the temporary restraining order previously issued and granted an order for a temporary injunction and the defendants appealed.

The District Court of Appeal, Bray, J., held that the city could maintain a representative suit on behalf of numerous parties having causes of action against the named defendant but that the complaint stated mere conclusions which did not justify the issuance of an injunction, and that a court on the application of one defendant in a damage suit is not authorized to restrain a codefendant from disposing of his assets.

Order reversed.

1. Injunction 🔑114(2)

In action by city in its own right and for benefit of all persons possessing 192 causes of action against railway company to restrain distribution by railway company of assets as a liquidating dividend to stockholders without any provision for payments of future judgments against it, that all persons for whom city was acting were not residents or necessary parties, and that common interest was attempted to be asserted as to only part of total assets did not preclude bringing of action. Code Civ.Proc. § 382.

2. Injunction 🔑11

Injunction is not proper remedy to prevent a person from doing an act which he has never undertaken or threatened to undertake.

3. Injunction 🔑1, 14

Injunction is an extra-ordinary power and is to be exercised always with great caution and in those cases only where it fairly appears on all papers presented before such injunction is granted that plaintiff will suffer irreparable injury if it be not issued or that it is necessary to preserve estates of parties or some sufficient cause showing need of hasty action exists.

4. Injunction 🔑9, 12

Power of injunction should be exercised only if the right be clear, the injury impending and threatened, so as to be averted only by protective preventive process of injunction.

5. Injunction 🔑118(3), 144

In action by city on its own behalf and on behalf of others possessing a total of 192 tort actions against railway company to restrain distribution of assets of railway company to stockholders allegation that company was threatening to distribute assets as a liquidating dividend without any provision for payment of future judgments against it, was mere conclusion which could not justify issuance of an injunction. Code Civ.Proc. § 527.

6. Injunction 🔑144

Where the complaint does not state a cause of action, it is improper to grant an injunction based thereon. Code Civ. Proc. § 527.

7. Injunction 🔑144

Where complaint is sole basis of order, and complaint is treated as an affidavit, its sufficiency must be tested by same rules applicable to oral testimony and conclusions that might stand as a matter of pleading are not competent to justify issuance of an injunction.

8. Injunction 🔑144

Unless statements in complaint in nature of conclusions, are supported by facts or circumstances on which they rest, complaint is insufficient to sustain an application for an injunction and if the complaint, otherwise unsupported is open to attack on general demurrer it is insufficient. Code Civ.Proc. § 527.

9. Evidence 🔑60
Injunction 🔑144

Where city on its own behalf and others sought to restrain distribution of assets by railway company on ground that insolvency would result, and that no provision had been made for payment of possible judgments rendered in tort actions by city and 192 others against company, but alleged insolvency could occur only if company violated fraudulent conveyances statute, that violation would take place would not be presumed, and bare conclusion unsupported by any facts to justify it would not be accepted by court as sole basis for extraordinary remedy of injunction. Civ. Code, § 3439 et seq.

10. Injunction 🔑147

Where city which had tort action pending against railway company brought representative suit on its own behalf and on behalf of other parties alleged to have 192 causes of action in tort against railway company, to restrain distribution of assets on ground that if distribution were not restrained, insolvency of defendant would result, but all equities alleged in complaint and in affidavits were fully and specifically controverted by defendant's answer and affidavits, granting of temporary injunction was improper. Code Civ.Proc. § 527.

11. Injunction 🔑118(1)

Where plaintiff alleged that certain actions for damages have been brought to which plaintiff and defendant were codefendants, and that if defendant were permitted to distribute certain of its assets, and judgments were obtained against both defendants, judgment creditors would pursue plaintiff alone, allegations did not state a cause of action for injunctive relief.

12. Injunction ⟹44

Where plaintiff sought to restrain defendant from paying out money in settlement of action brought by another against defendant on ground that payment if made would render defendant unable to pay possible judgments rendered against it in pending actions by plaintiff and others, and that party to whom payment was proposed to be made by defendant controlled defendant by stock ownership, settlement of action would be a preference and could be enjoined. Code Civ.Proc. §§ 382, 529.

Cyril Appel, Ivores R. Dains, George Liebermann, San Francisco, for appellants.

Dion R. Holm, City Attorney, A. Dal Thomson, Public Utilities Counsel, San Francisco, for respondent.

BRAY, Justice.

This action is brought against defendants, Market Street Railway Company, a corporation, its directors[1] and its treasurer, by plaintiff, City and County of San Francisco, a municipal corporation, in its own behalf and for all persons possessing causes of action against defendant railway company, for an injunction to restrain the payment by it of certain moneys. A temporary restraining order and order to show cause was issued on the filing of the complaint. On the hearing an order was made denying a motion to vacate the temporary restraining order and an order for issuance of temporary injunction was granted. Defendants appeal from the latter order.

Main Question.

The main question is whether, under the pleadings and evidence in this case, the issuance of a temporary injunction was proper.

Pleadings.

In the first of five causes of action, plaintiff alleges that since November 6, 1946, there has been pending an action in the San Francisco superior court brought by the city against the railway company for the sum of $2,826.79 for alleged negligence; that in the San Francisco and San Mateo County superior courts there are pending 192 tort actions brought by others than the city against the railway company, the total amount of the prayers being $2,770,976 (defendants in their answer deny liability in the city's actions, and allege that the total number of other actions pending is only 186 with total prayers of but $2,591,600.10); that as of September 29, 1944, the city acquired title to all of the operative properties of the railway company under a contract to pay $7,500,000; that the city made certain payments thereunder and on May 7, 1948, the city paid the railway company the sum of $1,945,345.70 which was the balance due; that unless restrained by the court, the railway company threatens to and will distribute said sum to its stockholders as a "so-called 'liquidating dividend' without any provision toward the payment of any judgment which may hereafter be rendered" in any of the actions before mentioned; that "Said fund" constitutes practically the whole of the property and assets owned by the railway company and that the transfer of any substantial portion of said fund to its stockholders will render the railway company insolvent and will deplete its assets to such extent that it will be unable to respond to the payment of the judgments which may be rendered; that if such distribution is made to the stockholders, the city and all holders of judgments to be rendered in the future will be required to sue the various stockholders and directors of the railway company in order to realize upon the judgments; that plaintiff and the others have no plain, speedy and adequate remedy; that the matters set forth are of common and general interest among all persons mentioned in the complaint, and all persons having causes of action against the railway company in which suits have not been filed; that these persons are numerous and that it is impracticable to bring all of them before the court and hence the city brings this suit in their behalf as well as in its own behalf.

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[1] Defendant Harry S. Scott was not served and has not appeared herein. Any reference to defendants herein does not include him. The corporation will be referred to as "the railway company." Plaintiff City and County of San Francisco will be referred to "the city."

The second count is the same as the first except that it substitutes for the allegations concerning the suit brought against the railway company by the city in the San Francisco superior court allegations concerning four negligence actions pending in the San Francisco municipal court brought by the city against the railway company, the aggregate sums prayed for being $1,691.09 (the railway company in its answer denies liability in these actions).

The third count incorporates the allegations of both the first and second counts and then alleges that the effect of any present distribution of said fund will render the "present fair salable value of the assets of defendant corporation less than the amount that will be required to pay defendant's probable liability on its existing debts as they become absolute and matured"; that the railway company "threatens to, and intends, as a so-called liquidating dividend to distribute said fund to the stockholders of defendant without receiving any consideration therefor."

The fourth cause of action is the same as the first except there is substituted for allegations concerning the suit in which the city is plaintiff, allegations concerning the pendency in the San Francisco superior court of eight tort actions brought by named plaintiffs in which both the city and the railway company are defendants, the total amount sued for being $176,916. It is further alleged that "if defendant corporation is permitted to denude itself of its assets and if judgment in any of said causes is entered against both defendants therein, the judgment creditor will undoubtedly refrain from endeavoring to pursue the directors or stockholders of said defendant corporation for the satisfaction of said judgment and will undoubtedly adopt the more expeditious course of pursuing the City and County of San Francisco alone upon such judgment. In such event, as a practical result, the City and County of San Francisco will alone be compelled to pay the whole of any such judgment, even though such judgment might be rendered against both defendants in said action." Defendants admitted the pendency of these actions but denied the other allegations.

In the fifth count, all of the allegations of the first two counts are incorporated. It is then alleged that there is pending in the District Court of the United States for the Northern District of California, Southern Division, a certain suit in which Standard Gas and Electric Company (referred to hereafter as "Standard") is plaintiff and the railway company is defendant. The complaint in that action is upon an open book account to recover the sum of $1,069,063.30 together with interest and costs; that defendants threaten to, and will, unless restrained, pay to Standard, in settlement of that suit, the sum of $550,000 and in addition will pay a $25,000 attorney's fee to the attorney for a committee representing certain prior preference stockholders of the railway company and the further sum of $12,500 to the members of the committee plus $4,500 for their expenses; that ever since 1935 Standard has owned 39.67% of the outstanding voting stock of the railway company and through such ownership has controlled and now controls all of the officers and directors of the railway company and has formulated and now formulates in its own interest, and dictates all of the business policies and affairs of the railway company; that "Solely by means of said domination and control, Standard has caused the plan to be adopted to pay immediately said alleged indebtedness, prior to any liquidation or dissolution proceeding in which all creditors of Market Street Railway Company would share in its assets equally"; that the intended payment will diminish the assets of the railway company to the extent that it will become insolvent and unable to respond to the payment of the judgments mentioned in all the counts of the complaint; that if such payment is made, the city and the persons in whose behalf this action is brought, will have to sue the directors consenting to such disbursement and that a receiver or trustee in bankruptcy will be required to institute an action against Standard to recover such preferential payment. Defendants admitted this suit and the 39.67% ownership by Standard, but denied the remainder of the count, except that they allege that the settlement will be made only if it is approved by the Securities and Exchange Commission and the District Court. They also denied as to all counts that they had threatened or intended to pay out the liquidating dividend prior to the settlement of all actions pending.

The complaint asked that defendants be restrained, pending the trial of the action, from distributing to the stockholders any portion of the money before mentioned, and from paying therefrom any sums to Standard, until adequate provision is made, with the approval of the court, for the payment by defendants of all judgments which may be rendered against the railway company in the actions mentioned in the complaint "or any others of like character, and for the satisfaction by defendant corporation of causes of action of similar kind upon which suits may not have been filed" and that upon the trial a permanent injunction be granted and if necessary a receiver be appointed to control said fund.

At the hearing of the order to show cause, defendants' demurrer to the complaint was overruled and the hearing was had on the complaint, which was unverified, two affidavits offered by plaintiff, the verified answer of defendants, and five affidavits offered by defendants.

Can the City Maintain an Action on Behalf of Others?

[1] The first question to be determined is whether the city, whose causes of action against the railway company total only $4,517.88, a very small amount as compared to the amounts alleged to be claimed by other plaintiffs, is legally entitled to sue on behalf of those others. The joinder of these persons is based on section 382 of the Code of Civil Procedure which provides: "* * and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." There is no requirement that the persons for whom the city is acting here be residents of San Francisco nor need they be necessary parties. Weaver v. Pasadena Tournament of Roses, 32 Cal.2d 833, 198 P.2d 514. Assuming for the purposes of this question only, that an injunction will lie to prevent distribution of the railway company's assets before the tort actions can be determined, there would be a common and general interest of all the parties plaintiff in the subject matter of this action. Certainly the parties are numerous and it would be impracticable to bring them all before the court. The situation is different here than in Carey v. Brown, 58 Cal. 180, in which it was sought to join adjacent landowners in a suit to quiet title. There the other persons had no interest in the particular land claimed by plaintiff and defendants. A judgment in favor of plaintiff would simply have quieted his title to land in which none of the others had any interest.

Watson v. Santa Carmelita, etc., Co., 58 Cal.App.2d 709, 137 P.2d 757, seems to hold that a representative suit is proper only where the action is for the purpose of conserving a common fund or property in which all of those represented have an interest. Here, all would have an interest in seeing that the assets of the company were not distributed without consideration of their pending suits. Defendants claim that there is no "fund" here. Strictly speaking, that is true. However, all plaintiffs would have a common interest in the *total* assets of the railway company. These moneys are a part of the total assets, and under the allegations of the complaint (we are now merely considering the allegations of the complaint as a pleading) it is alleged that the total assets of the railway company are insufficient to pay its present and contingent debts. The fact that the common interest is attempted to be asserted as to only a part of the total would not invalidate the action. The whole includes all its parts. Moreover, defendants did not demur on the ground of a defect of parties plaintiff. See Carey v. Brown, supra, 58 Cal. 180.

In holding that in a proper case the city might bring a representative action on behalf of other litigants, we do not include the problematical and highly indefinite persons whom defendants, in their verified answer, deny exist, and whom plaintiff includes in its unverified complaint, as persons who may hereafter bring actions. The representation would have to be limited to those who actually had filed suits prior to the commencement of this action.

Bond.

A more serious question arises as to whether a city, whose financial interest in the action is only $4,517.88, can obtain an injunction on behalf of others whose financial interest therein is over $2,000,000, without giving a bond to indemnify defendants if it is determined that the plaintiffs were not entitled to the injunction. Section 529 of the Code of Civil Procedure requires such a bond in all injunction proceedings "except when it is granted on the application of * * * a county, [or] a municipal corporation * * *." While, technically speaking, the application is that of the city, in view of the small interest of the city as compared to that of the others, it can hardly be considered the city's application, and while no bond could be required as to that portion relating to the city's own claim, a bond should be required from the others for whom the city is acting. However, this question was not presented to the court below by an application for an order requiring a bond as to that portion of the injunction not applying directly to the city's claims, and it is doubtful if the point can be raised now. In view of our decision on the merits of the appeal, it becomes unnecessary to determine this question.

Showing on Issuance of Injunction.

[2-8] "* * * injunction is not the proper remedy to prevent a person from doing an act which he has never undertaken or threatened to undertake * * *", 14 Cal.Jur. 208; see also Pezold v. Amalgamated, etc., Workmen, 54 Cal.App.2d 120, 127, 128 P.2d 611. Injunction "is an extraordinary power, and is to be exercised always with great caution and in those cases only where it fairly appears 'upon all the papers presented, before such injunction is granted, that the plaintiff will suffer irreparable injury if it be not issued, or that it is necessary to preserve the estates of the parties or some sufficient cause showing that need of hasty action exists.' Joyce on Injunctions, sec. 109. The power, therefore, should rarely, if ever, be exercised in a doubtful case. 'The right must be clear, the injury impending and threatened, so as to be averted only by the protective preventive process of injunction.'" Schwartz v. Arata, 45 Cal.App. 596, 601, 188 p. 313, 315. The showing here was not sufficient. The main contention upon which the right to an injunction is based is that defendants "threaten to, and will, distribute said sum paid to defendant corporation by plaintiff * * * to its stockholders as a so-called 'liquidating dividend' without any provision toward the payment of any judgment * * *." What is the evidence to support this allegation? The complaint is unverified. While the law permits a complaint by a city to be unverified and its sufficiency as a complaint cannot be challenged on that ground, it is doubtful if an unverified complaint can be used as an affidavit, particularly when contradicted by sworn affidavits. However, assuming that the unverified complaint may be used as an affidavit, the statements that defendants threaten to and will distribute the fund in violation of the rights of creditors, are mere conclusions, and will not justify the issuance of an injunction. "It is, of course, permissible to grant an injunction based solely upon the allegations of a verified complaint. (§ 527, Code Civ.Proc.) If the complaint does not state a cause of action, however, it is improper to grant an injunction based thereon. But this is not the only test that must be applied. Where the compaint is the sole basis of the order, and the complaint is treated as an affidavit, its sufficiency must be tested by the same rules applicable to oral testimony. Conclusions that might stand as a matter of pleading are not competent to justify the issuance of an injunction. The rules are thus stated in Willis v. Lauridson, 161 Cal. 106 at page 108, 118 p. 530, 531, * * * '* * * Unless the statement in the nature of a conclusion is

supported by the facts or circumstances on which it rests, it is insufficient to sustain an application for injunction. If the complaint, otherwise unsupported, is open to attack on general demurrer, it is insufficient.' * * *

"In McPheeters v. McMahon, 131 Cal. App. 418, 425, 21 P.2d 606, 609, this division of the court declared the rule to be that: 'An injunction should rarely, if ever, be issued in a doubtful case. The power should be exercised only when the right is clear, the injury impending and threatened, so as to be averted only by the protecting preventive process of injunction.'" Bank of America National Trust & Savings Ass'n v. Williams, 89 Cal.App.2d 21, 23-24, 200 P.2d 151, 153.

"A complaint for an injunction which alleges only general conclusions, not warranted by any pleading of facts, does not state a cause of action to enjoin the acts complained of. [Citing cases.]" E. H. Renzel Co. v. Warehousemen's Union, 16 Cal.2d 369, 373, 106 P.2d 1, 3.

In answer to these conclusions in the unverified complaint, defendants filed a verified answer denying them, and alleged that on April 30, 1948, the railway company had assets of over $3,462,612.20, current liabilities of only $24,357.15; that the alleged indebtedness to Standard of $1,069,063.30 could be settled for $592,000; that a petition requesting permission to make such a compromise is now pending before the Securities and Exchange Commission; that on May 7, 1948, there were 186 damage actions pending in all courts, the total amount prayed for being $2,591,600.10; that based on past experience the probable liability of the railway company in these actions will not exceed $500,000; that the time for bringing further damage actions against it had long since expired, with the exception of possible claims for damages for personal injuries sustained by minors prior to September 30, 1944, and it had no knowledge of any such possible claims of minors; that the railway company is solvent and the present salable value of its assets is in excess of the amount of its existing debts and its probable liability on all actions presently brought and which could be brought against it, and not barred by the statutes of limitation. Defendants cross-complained asking judgment for interest on the $1,945,345.70 from May 7, 1948, claiming that the instituting of this action, for the "purpose of preventing the defendants from the free and unrestricted lawful use" of the moneys paid by the city, constituted a violation of the contract under which the railway company sold its properties to the city.

Defendants also filed affidavits, one by each of the three defendant directors who were served in this action and one by the railway company's treasurer. Each affiant swore that the admissions, denials and allegations set forth in the answer and cross-complaint were true and correct and adopted them as if set forth at length in his affidavit. In rebuttal, plaintiff filed two affidavits. The first was by plaintiff's public utilities counsel in which he set forth an extract from the railway company's financial statement issued to its stockholders for the year 1947. This extract reads: "It is expected that the Legislature of the State of California will be in session on or about March 1, 1948, at which time the charter amendment will be presented to it for approval. After such approval it is anticipated that the City and County of San Francisco will act promptly to issue and sell such bonds and use such part of the proceeds as is necessary to pay the balance of its indebtedness to your Company. Thereafter the Management will take appropriate steps for the payment of an initial liquidating dividend." In this affidavit there was also set forth an extract from the railway company's report to the Railroad Commission which extract shows that Standard controlled the railway company by stock ownership. The other affidavit is by the chief assistant controller of the city. After stating his length of service and the fact that he is a certified public accountant, he sets forth his analysis of the assets and liabilities of the railway company as shown in defendants' answer and after taking the sum set forth in the prayer of plaintiff's complaint as a "Sum to be set aside for tort claims (Prayers of complaint) $2,591,600.10" and charging the railway company with the whole liability to Standard of $1,069,063.30, arrives at a "Difference between net worth and damage claims" of $222,408.35. He then states that the railway company's annual report to its stockholders as of December 31, 1947, stated "that the net deficit for said year was the sum of $208,221.49."

[9] In rebuttal of these affidavits defendants offered the affidavit of the railway company's secretary calling attention to the fact that the extract of the financial statement of 1947 appearing in the counteraffidavit of plaintiff's public utilities counsel, was taken out of its context. He then attached the full statement which shows that immediately following the extract appears the following: "To summarize, the Company will not be in position to finally settle its affairs until it:" (1) collects from the city the balance then due, (2) sells its remaining real estate, office furnitures and fixtures, (3) pays its indebtedness to Standard, (4) disposes of 197 damage actions with prayers totaling $2,770,976, and (5) disposes of claims for compensation and benefits of former employees. Thus it appears that plaintiff's whole claim of threats by defendants to distribute the fund is based solely upon one sentence in the 1947 statement which, read in context, shows that no such step was either contemplated or threatened. Again, the insolvency which plaintiff concludes might occur, can only occur if defendants violate the Uniform Fraudulent Conveyance Act, Civil Code, § 3439 et seq. That such a violation will take place cannot be presumed, nor can the bare conclusion of plaintiff, unsupported by any facts to justify it, be accepted by the court as the sole basis for the extraordinary remedy of injunction.

[10] All of the equities alleged in the complaint and in plaintiff's affidavits are fully and specifically controverted by defendants' answer and affidavits. The situation here, by reason of the fact that the latter show that factually the matters set forth in plaintiff's complaint and affidavits to the effect that defendants intend to distribute the fund without consideration of the damage actions are untrue, is somewhat similar to that where a preliminary injunction has been granted on a complaint which is unsupported by affidavits, and an answer is filed denying all of the equities of the complaint. In such cases it has been held that a motion to dissolve the injunction must be granted for the reason that the court granting the injunction was "without sufficient *proof* before it to justify the exercise of so extraordinary a power." Schwartz v. Arata, supra, 45 Cal.App. 601, 604, 188 P. 313, 316.

Demurrer Should Have Been Sustained to Count 4.

[11] In count 4, plaintiff's alleged cause of action is based upon its claim that certain actions for damages have been brought in which the city and the railway company are codefendants, and that if the railway company distributes its assets, and if judgments are obtained against both defendants, the judgment creditors will pursue the city alone. Plaintiff has not cited and we have been unable to find any authorities which authorize a court on the application of one defendant in a damage suit to restrain a codefendant from disposing of his assets. Therefore, no cause of action lies under this count.

Count 5.

[12] The fifth count refers to the action pending in the federal court, brought by Standard against the railway company, and seeks to restrain the railway company from paying out money in settlement of such action. On the face of the complaint it would appear, assuming all of the other allegations of the complaint to be true, that a payment to Standard, which it is alleged controls the railway company by stock ownership, in settlement of that action, would be a preference, and therefore could be enjoined. Title Ins., etc., Co. v. California Development Co., 171 Cal. 173, 152 P. 542. Therefore, as a pleading, the count is sufficient against demurrer.

The order appealed from is reversed.

PETERS, P. J., and WARD, J., concur.

Hearing denied; SHENK, J., dissenting.

95 Cal.App.2d 82

SIME v. MALOUF et al.

Civ. 16847.

District Court of Appeal, Second District, Division 3, California.

Jan. 13, 1950.

Hearing Denied Feb. 8, 1950.

Action by Harry R. Sime against A. B. Malouf and others for damages for conspiracy to defraud plaintiff of his interest in project as a joint adventurer to acquire bonds.

The Superior Court of Los Angeles County, W. Turney Fox, J., rendered a judgment for the plaintiff and the defendants appealed.

The District Court of Appeal, Per Curiam, affirmed the judgment, 212 P.2d 946, and on petition for rehearing held that plaintiff's associate was not an indispensable party to the action brought by plaintiff in whose name stood all the property rights involved and that whether one not named is an indispensable party goes to jurisdiction and may be raised at any time.

Petition for rehearing denied.

1. Parties ⚿80(1), 84(1)

Question whether one not named is an indispensable party goes to jurisdiction and may be raised at any time.

2. Joint adventures ⚿1.15, 8

In action against stockholders and officers for fraud and conspiracy to defraud plaintiff of his interest in project as joint adventurer with corporation to acquire bonds, evidence did not establish that plaintiff and his associate were joint adventurers, but even if two were jointly interested in claim, associate was not an indispensable party to an action brought by plaintiff in whose name stood all property rights involved.

3. Appeal and error ⚿832(4)

Questions which do not go to the question of jurisdiction, raised for the first time on petition for rehearing, will not be considered.

E. C. Pyle and George Acret, Los Angeles, for plaintiff and respondent.

Jennings & Belcher, Morris Lavine, Los Angeles, for defendants and appellants.

PER CURIAM.

Two petitions for rehearing have been filed by appellants. After reading them we deem it advisable to make some minor corrections in the opinion heretofore filed. Also, it is necessary to decide one point that has been raised for the first time on petition for rehearing and to discuss certain statements made by the author of one of the petitions.

In their briefs appellants made the point that Tad Travers, Kathleen Travers and Iona H. Sime were indispensable parties for the reason that they had signed a joint release with plaintiff and "that there could be no rescission of the release without the joinder of all the makers thereof." In one of the petitions for rehearing it is stated that the point of nonjoinder raised by appellants was not decided and that the failure to decide it "deprives appellants of their property without due process of law and denies to appellants the equal protection of the laws of the State of California." A reference to the briefs and to our opinion will readily show that the contention of appellants was fully considered and disposed of.

In the same petition for rehearing it is argued that the record shows without dispute that Sime and Travers were joint adventurers and that Travers was therefore an indispensable party. It is asserted that this contention was urged by appellants in the trial court upon a motion to exclude evidence. We are unable to find any support for the statement in the 340 pages of reporter's transcript of the argument on the motion. The ground for the claim of misjoinder advanced in the trial court was the one that was repeated in the briefs, and which was disposed of in our opinion.

[1] Under ordinary circumstances we would be justified in ignoring the point now raised for the first time by petition for rehearing. Sanders v. Howard Park Co., 86 Cal.App.2d 721, 723, 195 P.2d 898, and cases cited. However, the question whether one not named is an indispensable party, rather than a merely necessary party, see, Bank of California Nat. Ass'n v. Superior Court, 16 Cal.2d 516, 521–

524, 106 P.2d 879, goes to the jurisdiction and may be raised at any time. Ambassador Petroleum Co. v. Superior Court, 208 Cal. 667, 671, 284 P. 445; Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 265, 73 P.2d 1163. Incidentally, these cases are cited for the first time in the petitions for rehearing. The point will therefore be considered for the reason that it involves a question of jurisdiction.

[2] It appears to be contended in one of the petitions for rehearing that the court found that Sime and Travers were joint adventurers, the statement being that the trial court found "that Tad Travers had an interest in the ultimate success and profits of the joint adventure" and that one of the findings reads, in part, that certain defendants conspired to defraud "this plaintiff and his coadventurer of the fruits and profits of such venture." Although it might appear from this partial quotation that the court was referring to Travers as Sime's coadventurer, it clearly appears from the entire finding that the coadventurer mentioned was Edgerton, Riley & Walter, and not Travers. The question whether Sime and Travers were coadventurers was not raised or tried or determined by the court. Therefore, the argument now advanced must fall back on the claim, also made by appellants, that it was shown by undisputed evidence that Sime and Travers were coadventurers. Needless to say, we could not regard this as an established fact unless the evidence relevant to that question was complete, uncontradicted and conclusive, as to the existence of the claimed relationship. Instead of the evidence being complete it was extremely meager, and it was manifestly inconclusive. It was shown that Travers was associated with Crowell, Weedon & Co., who had a 50% interest in the Burbank project which was later acquired by Sunday. He had no contract or other connection with Edgerton, Riley & Walter. We have been referred to no evidence, and we have found none, explanatory of his arrangement with Sime. As a witness he did not assert ownership of an interest in the claim sued on, although he expressed the opinion that Sime should share any recovery with him. This court would be unjustified in assuming as an established fact that Sime and Travers were joint adventurers.

But even if the two were jointly interested in the claim, Travers was not an indispensable party to an action brought thereon by Sime, in whose name stood all the property rights involved. Russ v. Tuttle, 158 Cal. 226, 110 P. 813; Ah Tong v. Earle Fruit Co., 112 Cal. 679, 45 P. 7; Williams v. Southern Pac. R. Co., 110 Cal. 457, 42 P. 974; Chan Yo Chow v. Lim Sing, 87 Cal.App. 278, 261 P. 1039. Even if Travers should have a meritorious claim against Sime, which, of course, is not a question for decision in the present case, it is not a matter which concerns the defendants. 158 Cal. 230, 110 P. 813, supra.

[3] The petition for rehearing makes the further point, which was not raised in the briefs, that the judgment should not have gone against the corporate defendants. Certain facts are stated with relation to the original stock issues of the corporations, but no transcript references are given, nor is it stated that the alleged facts were before the trial court. The point is not one which goes to the question of jurisdiction, and having been raised for the first time on petition for rehearing, will not be considered. See cases cited, supra.

The petitions for rehearing are denied.

95 Cal.App.2d Supp. 931

PARTAMIAN v. FLODINE.

Civ. A. 7227.

Civ. 910846.

Superior Court, Appellate Department,
Los Angeles County, California.

Jan. 16, 1950.

Charles R. Partamian sued Eric Flodine, etc., to recover money plaintiff paid in connection with contracts whereunder plaintiff was allowed a place in line to buy an automobile from defendant dealer when and if defendant had an automobile of the involved make to sell, and in connection with contract for sale of automobile accessories to plaintiff.

The Municipal Court of the City of Los Angeles, Joseph Marchetti, J., rendered a judgment for plaintiff and defendant appealed.

The Superior Court, Bishop, J., held that alleged fraudulent representation of defendant was not established.

Judgment reversed.

1. Evidence ⚷434(8)

Upon rescission of contracts, plaintiff could present evidence of fraud in order to recover money he was induced by alleged fraud of defendant to pay, notwithstanding provision that entire agreement was contained in contracts and that no representations had been made except as specifically stated therein, but fraud could not consist of promises contrary to those contained in contracts.

2. Evidence ⚷434(8)

Where written contracts expressly provided that they were not subject to cancellation, oral evidence of an alleged fraudulent representation that the contracts could be canceled at any time was not admissible.

3. Payment ⚷89(5)

In action to recover money plaintiff paid in connection with contract whereunder plaintiff was allotted a place in line to buy an automobile from dealer evidence did not establish that defendant fraudulently represented that plaintiff would be able to procure and buy an automobile of the make involved and would be able to use the accessories on the automobile.

4. Payment ⚷89(5)

In action to recover money plaintiff paid in connection with contracts whereunder plaintiff was allotted a place in line to buy an automobile from defendant dealer plaintiff had burden of proving alleged fraudulent representations of defendant.

5. Payment ⚷89(5)

Plaintiff could not recover money plaintiff paid in connection with contract whereunder plaintiff was allotted a place in line to buy an automobile from defendant dealer, on ground of alleged fraudulent representations that plaintiff would be able to buy automobile of make involved and to use accessories on automobile, if plaintiff instead of relying on representations, relied upon understanding generally prevalent that automobile involved was soon to be put on market.

6. Sales ⚷64

Where plaintiff paid automobile dealer money in return for option to buy an automobile of new make expected to be marketed soon, contingent upon receipt by dealer of specified number of such automobiles to deliver, and for right to buy automobile accessories upon demand, condition that if required number of automobiles were not delivered to defendant within a reasonable time plaintiff might have his money back would not be added to contracts by implication, where condition was contrary to express provision that contracts were not subject to cancellation, and such addition was not necessary to give effect to contract.

7. Contracts ⚷168

Implied covenants are not favored in law and courts will declare implied covenants to exist only when there is a satisfactory basis in express contract of parties which makes it necessary to imply certain duties and obligations in order to effect the purposes of parties.

8. Contracts ⚷168

Implied covenants can be justified only upon ground of legal necessity arising from terms of contract, or substance thereof, and circumstances attending its execution, and implication from words must be such as will clearly authorize inference of an imputation in law of creation of a covenant.

Youngdahl & Glick, Los Angeles, for appellant.

Astor & Astor, Los Angeles, for respondent.

BISHOP, Judge.

Plaintiff sought a judgment awarding him the sum of $237.93, the amount he had paid in connection with two written contracts which, he claimed, he was induced to enter into by fraud, and as a result of which he obtained nothing. More specifically, he alleged that he had "made a written agreement wherein and whereby the said plaintiff placed an order with the said defendants for the purchase and subsequent delivery of an automobile known as Tucker Motor car, and that he was induced to enter into another contract whereby he agreed to purchase, and the defendants agreed to sell, certain accessories to be used in connection with the Tucker motor car, by the fraudulent representation of the defendants that he (the plaintiff) would be able to procure and purchase said Tucker motor car and would be able to use the accessories on it. The defendants knew, he further alleged, that Tucker cars were not being produced, and that plaintiff could not obtain one. The trial court found these allegations to be true and awarded plaintiff a judgment for the amount he had paid the defendants. We have concluded that the evidence fails to support the findings essential to the judgment.

There is very little conflict in the evidence. Plaintiff, as did one hundred other persons, entered into two written contracts with the defendant. The essence of one is in these words:

"The undersigned dealer allots to the undersigned customer the 98 Tucker motor car which he may sell and deliver at retail if, as, and when they are produced and made available for delivery through said dealer. * * *

"The customer is not hereby bound to order or accept delivery of a Tucker motor car, but may, if he desires, purchase said motor car according to said sequence number.

"In consideration hereof and of such purchase, if made by the customer, the customer agrees to retain ownership of said Tucker motor car for a period of one (1) year * * *."

These are the significant terms of the other writing:

"Tucker Accessory Purchase Order 98. In consideration of $237.93, the receipt of which is hereby acknowledged, the undersigned dealer sells and agrees to deliver to the undersigned purchaser one group of automobile accessories as indicated below. * * * Group No. 7. Auto Radio $96.50 Seat Covers $69.50 Car Heater $65. $231.00 Sales Tax $6.43. Total 237.93. * * *

"It is specifically understood and agreed that this purchase order is in no way to be construed as an order for or purchase of a Tucker motor car and it is also understood that purchaser, by buying the Tucker Accessory Group Package, does not thereby agree to purchase or accept delivery of a Tucker motor car, as, if and when they are produced.

"It is further understood and agreed that this instrument contains the entire agreement and understanding between the parties concerning the purchase of the Tucker Accessory Group Package and that no representations, agreements or understandings have been made except as specifically stated herein.

"This sale is not subject to cancellation."

The plaintiff, no doubt, as the trial court became convinced early in the trial, desired to own a Tucker automobile, and that was why he signed the two agreements from which we have quoted. It appears that he was compelled to sign the accessory agreement in order to secure defendant's consent to that first set forth. No doubt, too, as the trial court stated, the two agreements constituted but one transaction.

It is also clear, however, beyond debate, that these two writings, taken together or singly, did not result in any agreement whereby plaintiff placed an order for the purchase or delivery of a Tucker car. That which plaintiff obtained, and all that he obtained with respect to the Tucker car, was an option to purchase one "if, as and when" defendant ever had one to deliver. Words could hardly be found to make this clearer than the words appearing in the writing. The plaintiff was not placing his order for a car, but was being allotted a place in line by virtue of which, when his turn came, if it ever did, he could purchase a car if he then wished to do so.

Postponing for a moment consideration of the contention that defendant's fraud induced the plaintiff to enter these contracts, we find nothing that makes them invalid. It appears that plaintiff came to the defendant voluntarily, and signed up under no duress or compulsion other than his own inner urge. Defendant was under no obligation, before plaintiff came in, to agree to prefer him over anybody else if, at some indefinite date, he (the defendant) had a Tucker car to deliver. Had plaintiff paid defendant $237.93 for the chance he was offered, without any accessories involved, we would see nothing unconscionable or illegal about the transaction, and dressing up the deal by including the accessories does not render it less valid. Plaintiff, so far as appears, was of age and mentally competent; the chance being taken was not in the nature of a lottery; he took a legitimate chance. That it did not pan out is no reason why he should have his money back.

[1, 2] Turning now to the matter of fraud, it is, of course, true that in spite of the provisions contained in the next to the last paragraph of the accessory purchase order, the plaintiff can, upon a rescission, present evidence of fraud in order to recover that which he was induced by fraud to pay. Speck v. Wylie, 1934, 1 Cal.2d 625, 36 P.2d 618, 95 A.L.R. 760; Herzog v. Capital Co., 1945, 27 Cal.2d 349, 353, 164 P.2d 8. The fraud may not, however, consist of promises contrary to those contained in the written contracts. Bank of America Nat. Trust & Savings Ass'n v. Pendergrass, 1935, 4 Cal.2d 258, 263, 48 P.2d 659; Cobbs v. Cobbs, 1942, 53 Cal.App.2d 780, 785, 128 P.2d 373. So it is that the "fraudulent representation," (neither alleged nor found to have been made, but strongly stressed by the plaintiff as he testified, and presented in his argument on appeal) that the accessory purchase contract could be cancelled at any time, may not be relied upon by the plaintiff. With commendable candor he freely admitted, when a witness, that he had read the agreement before he signed it. It plainly states that "This sale is not subject to cancellation." He may not rescind because of any statement by defendant's agent that he could.

[3-5] We find, as already indicated, that the evidence fails to support the allegations and findings touching fraud. Plaintiff, of course, having based his case upon fraud, had the burden of proving it. In re Estate of Ross, 1926, 199 Cal. 641, 651, 250 P. 676, 680; Hedden v. Waldeck, 1937, 9 Cal.2d 631, 636, 72 P.2d 114, 116. In his complaint he alleged that it had been represented to him "that he would be able to procure and purchase said Tucker motor car" whereas in fact defendant "knew and had knowledge that said plaintiff would not be able to purchase or procure the said Tucker motor car * * *. That said defendants at said time concealed and withheld the knowledge from this plaintiff that there were no Tucker motor cars in production * * *." There is no evidence whatever supporting the finding that there was no Tucker motor car in production, let alone that the defendant knew that there was none but concealed the fact from the plaintiff. The nearest that plaintiff came to proving his allegations was when he testified: "They told me deliveries would start in October, and that I should get mine in the near future" and again when he replied "Yes" to the question, "They told you that deliveries would start about October of 1948?" (Other statements made after the contracts had been executed did not induce their execution, obviously, and need not be reviewed.) These representations as to a future event were not shown to be fraudulently made. The defendant testified that "We had a representation from the factory we could

deliver a car on or about a certain date * * * they were going to start three months after in September, so we could start the delivery of cars in December" and there was not a scrap of evidence to warrant the conclusion that the defendant had not been so advised or that he knew that he was a dealer for a nonexistent automobile. Nor did plaintiff testify that he relied upon any statements made by the defendant's salesmen (plaintiff and the defendant never met) to the effect that Tucker cars would be produced. So far as appears, the plaintiff may have relied entirely upon the understanding generally prevalent in September, 1948, that a revolutionary car was about to be put on the market, in which event no actionable fraud exists. Carter v. Seaboard Finance Co., 1949, 33 Cal.2d 564, 570, 203 P.2d 758, 762. The result is that there was no substantial evidence that the defendant was guilty of fraud inducing plaintiff to sign the writings or pay over any money.

[6-8] Nor may the judgment be sustained on the theory of failure of consideration. Plaintiff obtained that which he bought and paid his money for under the express terms of the contracts, that is, a combination of two things: an option to purchase, expressly made contingent upon defendant's receiving 98 cars to deliver; and the right to the delivery of the accessories upon demand. With respect to these two things, there is no evidence of a failure of consideration. The condition may not be added to these contracts by implication, that if the 98th car was not delivered within a reasonable time plaintiff might have his money back upon demand. As such a condition would be both contrary to an express provision of the writings ("This is not subject to cancellation") and is not necessary to give effect to the writings, it may not be indulged in. "It may be stated generally that implied covenants are not favored in the law; and courts will declare the same to exist only when there is a satisfactory basis in the express contract of the parties which makes it necessary to imply certain duties and obligations in order to effect the purposes of the parties to the contract made. Furthermore, implied covenants can be justified only upon the ground of legal necessity arising from the terms of the contract, or the substance thereof, and the circumstances attending its execution; and the implication from the words must be such as will clearly authorize the inference of an imputation in law of the creation of a covenant. (14 Am.Jur., pp. 490, 491.)" Cousins Inv. Co. v. Hastings Clothing Co., 1941, 45 Cal.App.2d 141, 143-144, 113 P.2d 878, 879. "True, courts have frequently considered implied covenants as being within a contract but such covenants are justified only when they are not inconsistent with some express term of the contract and, in the absence of such implied terms, the contract could not be effectively performed. Williston on Contracts, vol. 5, § 1293; Jones v. Interstate Oil Corp., 115 Cal.App. 302, 1 P.2d 1051." Tanner v. Title Ins. & Tr. Co., 1942, 20 Cal.2d 814, 824, 129 P.2d 383, 389.

The judgment is reversed.

SHAW, P. J., and STEPHENS, J., concur.

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SECOND SERIES

34 Cal.2d 695

PEOPLE v. CITY OF LOS ANGELES et al.

L. A. 19404.

Supreme Court of California, in Bank.

Feb. 7, 1950.

Action by the People against the City of Los Angeles and others, to enjoin defendants from releasing water into or onto Owens Lake as the result of operation of defendant's aqueduct system.

The Superior Court for Riverside County, O. K. Morton, J., rendered an adverse judgment, and the City of Los Angeles and its Department of Water and Power appealed.

The Supreme Court, Traynor, J., held that defendants could be enjoined from releasing waters into the lake unless the flow of the Owens Valley watershed was in excess of an amount equal to the reasonable capacity of the aqueduct system and all of its component facilities reasonably operated. The court also held that the Long Valley dam and reservoir were not a component facility and enjoined the defendants from taking into the aqueduct, waters from the Mono Basin watershed if such would increase the flow of the Owens River, necessitating diversion of overflow into the former lake.

Judgment modified, and as modified affirmed.

Prior opinion, 200 P.2d 122.

1. Waters and water courses 🔑195

Where city of Los Angeles for many years diverted water of the Owens River into its aqueduct system, exposing the bed of Owens Lake, and chemical plants were erected thereon under leases from the state, and many years later city again released flood waters onto lake bed, city could not resist injunctive relief sought by state against release of water on ground a public use had attached to the release, if an injunction framed with reference to legal rights of the parties would not place an undue burden on operation of the aqueduct system.

2. Waters and water courses 🔑195

Where city of Los Angeles for many years diverted water of the Owens River into its aqueduct system, exposing bed of Owens Lake, and chemical plants were erected thereon under leases from the state, and thereafter city extended system into the Mono Basin watershed, city was obligated not to divert Mono Basin waters into the Owens River if total resulting flow into aqueduct would exceed its capacity and thus necessitate release of water onto the lake bed.

3. Waters and water courses 🔑195

Where city of Los Angeles for many years diverted water of Owens River into aqueduct system, exposing bed of Owens Lake, and chemical plants were erected thereon under leases from the state, which sought to enjoin city from discharging flood waters into lake, and after suit was begun city completed dam which could be used to control waters of the Owens Valley watershed, city's obligations with respect to Owens Valley waters were not increased by erection of the dam, and state and lessees could not rely on continued use of the dam for control purposes.

4. Waters and water courses 🔑195

Where city of Los Angeles for many years diverted water of Owens River into aqueduct system, and chemical plants were erected on exposed bed of Owens Lake under leases from the state, and thereafter city mingled waters from the Mono Basin shed, but could control such waters by means of a tunnel, and city maintained dam for storing Mono waters when capacity of aqueduct was overtaxed and could reasonably predict natural flow of Owens River, state was entitled to an injunction prohibiting city from augmenting flow of Owens water by addition of Mono waters when such would require release of excess water into former lake.

5. Waters and water courses ⚿**195**

Where city of Los Angeles for many years diverted water of Owens River into aqueduct system, and exposed bed of Owens Lake was leased from the state for erection of chemical plants, and city acquired lands in Owens Valley so it could take waters therefrom, and thereafter city planned to use excess water for irrigation purposes, state and lessees could not require city to spread water on valley lands in greater amounts than could be reasonably used thereon or stored under ground rather than release flood waters into former lake bed.

◆

Ray L. Chesebro, City Attorney, Gilmore Tillman, Chief Assistant City Attorney, C. T. Waldo, Assistant City Attorney, Cecil A. Borden, Deputy City Attorney, Los Angeles, and A. E. Chandler, San Francisco, for appellants.

Fred N. Howser, Attorney General, Walter L. Bowers, Assistant Attorney General, and Burdette J. Daniels, Deputy Attorney General, for respondent.

TRAYNOR, Justice.

In 1913, defendant city of Los Angeles completed its aqueduct to the Owens River, which previously emptied into Owens Lake, a salt-water lake without outlet. The city completed in 1939 an extension of its aqueduct system into the Mono Basin watershed and in 1941 its Long Valley dam at the upper end of Owens Valley. From 1919 to 1937 it diverted virtually all the flow of the Owens River into its aqueduct above Owens Lake. By 1921 the lake was dry and remained so until 1937; as a consequence valuable mineral deposits in the bed of the lake were made available. In 1937, 1938, and 1939, the city released large quantities of water onto the lake bed, causing extensive damage to the mineral deposits and chemical plants located on the lake bed. In 1939 the state, as owner of the lake bed, brought this action for an injunction to define the extent to which the city may release water onto the lake bed. The trial court granted an injunction and the city has appealed.

The judgment entered enjoins the city from:

"(1) Diverting any or all waters from the Mono Basin watershed or waters partially comprised of, or augmented by said foreign Mono waters, out of defendants' aqueduct system into or onto Owens Lake, Inyo County, California, or in any way releasing such foreign Mono waters from the Mono Basin watershed, or waters partially comprising of or augmented by said foreign Mono waters, to be deposited into or onto said Owens Lake;

"(2) Diverting any or all waters of the Owens River and its tributaries out of defendants' aqueduct system onto Owens Lake, Inyo County, California, or in any way releasing waters of said Owens River, or its tributaries to be deposited into or onto said Owens Lake, which are not in excess of an amount equal to the reasonable capacity of defendants' aqueduct system and all of its component facilities reasonably operated."

The principles governing the disposition of this case were set forth in Natural Soda Product Co. v. City of Los Angeles, 23 Cal.2d 193, 143 P.2d 12. In that case a lessee of mineral rights from the state secured a judgment for damages against the city for the damage to its chemical plant and business caused by the flooding of Owens Lake in 1937. It was there held that by its long continued diversion of water from Owens River the city had obligated itself to continue that diversion within the reasonable capacity of its aqueduct system for the benefit of those who had reasonably relied on such diversion in undertaking the development of the mineral resources of the lake bed. In the present case it is necessary to decide whether the city's obligation can be enforced by injunction, and if so, to determine the extent of the injunction.

[1] The city contends that no injunction should issue because a public use has attached to the release of water from the aqueduct system onto Owens Lake, and that therefore the state's relief should be limited to damages. If an injunction framed with reference to the legal rights of the parties would not place an undue burden on the operation of the aqueduct system, it cannot reasonably be held that a public use has attached to the release of waters to be enjoined. City of Lodi v. East Bay Mun. Utility Dist., 7 Cal.2d 316, 345, 60 P.2d 439. It is therefore necessary to consider the rights of the parties in 1937 as determined by the Natural Soda Products Co. case and to determine how those rights have been affected by subsequent additions to the aqueduct system.

The Natural Soda Products Co. case established that the city, by its long continued diversion of the waters of the Owens River, incurred an obligation to continue that diversion within the reasonable capacity of its aqueduct system, at least so long as it continued to maintain its aqueduct. As between the city and the state's lessees on the lake bed such diversion was recognized as the new natural condition with respect to the waters of the Owens River.

[2] The city's extension of its aqueduct system into the Mono Basin watershed since 1937 was necessitated by its growing population and the fact that the normal flow of the Owens River is often substantially below the capacity of the aqueduct. The Mono waters constitute an added burden on the aqueduct facilities available for diverting the waters of the river above Owens Lake. There is no problem when the total flow of the Owens River as augmented by Mono waters is less than the capacity of the aqueduct. Since Mono waters, however, would not naturally flow into the Owens Valley watershed, the city is obligated not to divert them into the Owens River if the total resulting flow would exceed the capacity of its aqueduct and thus necessitate the release of water onto Owens Lake. Rudel v. Los Angeles County, 118 Cal. 281, 50 P. 400; Hellman Commercial Trust & Savings Bank v. Southern Pac. Co., 190 Cal. 626, 634, 214 P. 46.

The city contends that its Long Valley dam, completed since 1937, cannot be considered a part of the aqueduct facilities that it is obligated to devote to the control of Owens Valley waters. With this contention we agree.

[3] Since the city's ability to divert the flow of the Owens River was limited by the reasonable capacity of the aqueduct, those who undertook to develop the resources of the lake bed could not reasonably rely on diversion of water in excess of that capacity. By completing a new dam in 1941, the city did not increase its obligations with respect to Owens Valley waters. Ireland v. Henrylyn Irr. Dist., 113 Colo. 555, 160 P.2d 364, 366. There would be no such additional obligations unless the city operated the dam long enough and in such a manner that lower owners could reasonably rely on the continuance of that operation. Natural Soda Prod. Co. v. City of L. A., 23 Cal.2d 193, 197, 143 P.2d 12. The city did not complete its Long Valley dam until after this action was commenced. Its use of the dam to control the waters of the Owens Valley watershed under the compulsion of the temporary restraining order gives the state and its lessees no right to rely on the city's continuing to use the dam for that purpose.

The effect of the additions to the aqueduct system since 1937 on the rights and obligations of the parties may be summarized as follows: The city remains obligated, as it was in 1937, to divert into its aqueduct system all of the flow of the Owens River not in excess of the reasonable capacity of that system exclusive of the Long Valley dam. The city is obligated not to increase the natural flow of the Owens River by diverting into it waters of the Mono Basin watershed, if such a diversion would necessitate the release of water onto Owens Lake. The city is free to use its Long Valley dam exclusively for the purpose of meeting its obligations with respect to Mono waters.

[4] The enforcement of the city's obligations by injunctive relief will not place

any undue burden on the operation of the aqueduct system. The city needs all the water that can be transported through its aqueduct. Moreover, it should have no difficulty in controlling the flow of Mono waters to avoid the release of water onto Owens Lake. The Mono waters enter Owens Valley through a tunnel between the Owens Valley and Mono Basin watersheds. The flow through the tunnel may be regulated, and the city has available the facilities provided by its Long Valley dam for storing Mono waters when their addition to the natural flow of the Owens River would overtax the capacity of the aqueduct. The city also can predict with reasonable accuracy what the natural flow of the Owens River will be and can therefore determine in advance how much water it may safely divert from the Mono Basin watershed. Accordingly, an injunction prohibiting the city from augumenting the flow of the Owens River by the addition of Mono waters when such an augumentation would necessitate the release of water onto Owens Lake, will not unduly interfere with the operation of the aqueduct system.

It is clear from the trial court's opinion that it considered the city obligated to use all its aqueduct facilities, including the Long Valley dam, primarily for the control of Owens Valley waters, and that the injunction was designed to enforce that obligation. Paragraph one prohibits the release of any waters onto Owens Lake that include waters from the Mono Basin watershed. Paragraph two prohibits the release of any waters onto Owens Lake that "are not in excess of an amount equal to the reasonable capacity of defendants' aqueduct system and all of its component facilities reasonably operated." Since the Long Valley dam is a component facility of the aqueduct system, paragraph two erroneously requires the city to use that dam for the control of Owens Valley waters. Moreover, paragraph one erroneously restricts the city's right to use the Long Valley dam for the storage of Mono waters.

The city's obligation with respect to Mono waters is not to augment the flow of the Owens River past the Long Valley dam if such an augmentation would necessitate the release of water onto Owens Lake. If this obligation is fulfilled, it is immaterial that the waters released from the dam are comprised of both Owens Valley and Mono waters. Such a mixture of waters will occur whenever the city brings Mono waters into the Owens Valley, but so long as the city stores Owens Valley waters in its Long Valley dam in quantities equal to the amount of Mono waters released into the Owens River, its diversion of Mono waters will have no adverse effect on Owens Lake. The injunction must therefore be modified to exclude the Long Valley dam from the facilities that must be devoted to the control of the natural flow of the Owens River and to define the city's obligation with respect to Mono waters in terms of the effect of such waters on the natural flow of the Owens River past Long Valley dam rather than in terms of their mere presence in the aqueduct system.

[5] The city also seeks a clarification of the injunction with respect to the extent of its duty to spread surplus water on the 300,000 acres of land it has acquired in the Owens Valley. The city acquired these lands so that it could take for municipal use the waters formerly used on them. It states that it plans to irrigate or spread excess water above municipal needs upon these lands in quantity sufficient to restore the ground water level after periods of pumping, and to obtain such revenue from the economic use of such lands and excess water as it can without endangering the municipal water supply. It contends that it is under no obligation to spread water in excessive amounts that would water log the land and interfere with its economic use for agricultural purposes. As noted in the Natural Soda Products Company case, the city's conduct with respect to its Owens Valley lands was primarily aimed at taking water off the land and thus increasing the supply available for aqueduct diversion. The state and its lessees could not reasonably rely on the city's spreading water in greater amounts than could reasonably be used on the land or stored underground for future municipal uses, and the city has therefore incurred no obligation to spread water in excess of such amounts.

The judgment is modified by striking therefrom all of paragraphs one and two defining the conduct that is enjoined and inserting in lieu thereof the following:

(1) Diverting any waters out of defendants' aqueduct system onto Owens Lake, or in any way releasing any waters to be deposited into or onto Owens Lake at any time, unless the flow of water of the Owens Valley watershed is in excess of an amount equal to the reasonable capacity of defendants' aqueduct system and all of its component facilities reasonably operated. Defendants' Long Valley dam and reservoir shall not be considered a component facility of the aqueduct system for the purposes of this paragraph. The reasonable operation contemplated herein shall not require any diversion of waters onto the defendants' lands in Owens Valley in excess of amounts that may reasonably be used on said lands or stored thereunder for future beneficial use by the defendants.

(2) Diverting or taking into defendants' aqueduct system any waters from the Mono Basin watershed if there would thereby be an increase in the flow of the Owens River past the Long Valley dam that would necessitate the diversion of any waters from defendants' aqueduct system into or onto said Owens Lake.

As so modified the judgment is affirmed. Each side is to bear its own costs on this appeal.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.

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34 Cal.2d 678

LINDENBERG v. MacDONALD et al.

S. F. 17809.

Supreme Court of California, in Bank.
Feb. 3, 1950.

Rehearing Denied March 2, 1950.

Albert Lindenberg sued Graeme MacDonald and Maria Bacon MacDonald, individually and doing business as MacDonald Products Company, a copartnership, for damages for claimed constructive eviction allegedly caused by defendants' asserted unlawful attempt in bad faith to terminate a sublease of realty.

The Superior Court, San Francisco County, Edward P. Murphy, J., entered a judgment adverse to plaintiff and plaintiff appealed.

The Supreme Court, Schauer, J., held that evidence did not establish that notice of termination of sublease was given in bad faith by defendants so as to entitle plaintiffs to damages.

Judgment affirmed.

Edmonds, Traynor, and Carter, JJ., dissented.

For prior opinion see 195 P.2d 816.

1. Landlord and tenant 🔑180(1)

Where defendant lessee was required by lease to demolish old building and erect a new building, and defendant leased to plaintiffs by sub-lease specifically made subject to defendant's lease and entitling defendant to terminate sublease upon 60 days notice if new building was to be erected, and defendant gave plaintiffs such notice although necessary permit to build was not yet issued by war production board, and plaintiffs moved and issuance of permit was delayed because of war time conditions, plaintiffs could not recover damages for constructive unlawful eviction without establishing bad faith of defendant in giving termination notice.

2. Landlord and tenant 🔑172(2)

Some substantial interference by the landlord which is injurious to tenant's beneficial use and enjoyment of premises must occur to constitute a constructive eviction.

3. Landlord and tenant 🔑172(1)

A threat made in good faith to resort to legal process does not constitute "duress" and cannot amount to a "constructive eviction" of a tenant.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Constructive Eviction" and "Duress".

4. Property 🔑1

Primarily, but subject to general laws within the constitutional scope, the right of ownership of land is limited only by private contract of owner.

5. Landlord and tenant ⚩180(3)

Where defendant lessee was required by lease to demolish old building and erect new building, and defendant leased to plaintiffs by sublease specifically made subject to defendant's lease and entitling defendant to terminate sublease by 60 days notice if new building was to be erected, and defendant gave plaintiffs such notice although necessary permit to build was not yet issued by war production board, and plaintiffs moved and issuance of permit was delayed because of wartime conditions, evidence did not establish that termination notice was issued in bad faith so as to entitle plaintiffs to damages for constructive unlawful eviction.

◆

Millard Smith, Vallejo, George Olshausen and Philander Brooks Beadle, San Francisco, for appellant.

Hoge, Pelton & Gunther and Leo V. Killion, San Francisco, for respondents.

SCHAUER, Justice.

Plaintiff appeals from an adverse judgment entered upon a directed verdict in his action for damages (presumably for claimed constructive eviction) allegedly caused by defendants' attempt, asserted by plaintiff to have been made in bad faith and unlawfully, to terminate a sublease (sometimes referred to as a lease) of real property. We have concluded that the trial court correctly determined that there was no evidence legally sufficient to show bad faith, constructive eviction, or any unlawful act by defendants, and that the judgment must be affirmed.

Defendants are husband and wife and are sued individually and as partners doing business under the name of MacDonald Products Co. In 1942 they subleased to plaintiff for a three-year term ending December 31, 1945, certain store space "having a frontage of approximately 17 feet by a depth of approximately 29 feet" in a building located in Vallejo. Plaintiff opened a retail flower shop and "novelty jewelry" store in the leased premises. The sublease contained the following provision: "Lessor may terminate this lease in the event that the existing improvements are to be torn down to make way for the erection of a new building on sixty (60) days written notice addressed to the lessee * * * It is understood that this is a sublease and subject to all of the terms and conditions in that certain * * * lease made the 26th day of September, 1941 by and between George Edward McGill and Mabel McGill, as lessors and Graeme MacDonald, as lessee, as well as that certain addenda dated the 14th day of October, 1941 * * *"

In October, 1944, defendants, in contemplation of performance by them of an obligation imposed, and under rights conferred, by the McGill lease, negotiated with the J. C. Penney Company for a long term sublease of a new building to be erected by defendants after the building containing the space leased by plaintiff had been torn down, and on November 30, they served upon plaintiff the following notice: "Arrangements have been made to tear down the building which you now occupy and a new building will be erected thereon as soon as you and the other tenants have moved. All tenants have been notified.

"Therefore, I am now giving notice as required by the lease, for you to vacate the premises at 407 Georgia Street not later than January 31, 1945. I regret that you have to move at the present time, as I know the difficulties of finding a suitable location under the present conditions, but in order for me to make certain arrangements which I must do in Vallejo, I must erect this new building now." Other tenants in the same building, all but one of whom also held under subleases, were given the same notice.

Defendant husband knew, at the time the above notice was given, that the new building could not then be constructed without a permit from the War Production Board; he fully intended to build but not without the permit. Although the permit had not yet been issued, the defendants' property manager, Mrs. Apgar, who had been negotiating with the board, "felt sure" from those negotiations and from previous experience in securing similar permits that it would be issued, as did defendant husband; they knew, however, that the board had made no binding commitment. As previously indicated, defendants did not own the lot on which the store occupied by plaintiff was situated, but in 1941 had leased it from George Edward McGill and Mabel McGill "over a long period of years" with an agreement to pay a monthly rent to the owners, "to pay the taxes for a period of 45 years," and "tear those shacks down off that lot" and construct a new building which was to serve as security for the long-term lease. The new building had not been erected prior to the fall of 1944 because of priorities difficulties and lack of a definite tenant, and defendants had secured from the McGills two extensions of time to comply with their agreement to build. Plaintiff was aware of the obligation of defendants to demolish the old building and to construct a new one, as it was expressly provided in plaintiff's sublease, as above noted, that "this is a sublease and subject to all of the terms and conditions in that certain indenture of lease made [in] * * * 1941 by and between [the McGills] * * *, as lessors and [defendant husband] * * *, as lessee."

Mrs. Apgar and defendant husband testified that within a few days of the giving of the notice to plaintiff (whether before or after is uncertain from the record), defendants employed an architect to prepare plans for the new building, which was to cost approximately $45,000 and was to follow suggestions made to Mrs. Apgar by the War Production Board as to the "type of plan" and of building materials which should be used, and obligated themselves for the architect's fees of some $2250; the plans were necessary before formal application for the permit could be made. They also ordered an iron truss, to cost $450; incurred an obligation of $500 to a wrecking contractor for services performed and material purchased by him preliminary to actually wrecking the existing building; and "made arrangement" with a contractor and sub-contractor for construction of the new building. Defendants also procured from Army and Navy officials and the Mayor of Vallejo, and filed with the War Production Board, written statements concerning the necessity for the new building.

During December, 1944, because of serious setbacks to United States and allied forces in the Battle of the Bulge in Europe, governmental building restrictions were made more stringent and defendants were informed by the board that issuance of the permit was uncertain. During the latter part of December, 1944, or the first week in January, 1945, Mrs. Apgar informed plaintiff and other tenants of this situation and offered to allow them to stay on a "short termination" basis—in plaintiff's case, on a basis of one or two weeks' notice—at the same rent they had been paying; plaintiff declined, and vacated the premises on January 13, 1945. Mrs. Apgar testified that plaintiff and his wife stated they wished to take a vacation unless they could remain in the store for "the whole year." After plaintiff vacated, the space he had occupied was rented to one of his former employes, to whom plaintiff then sold fixtures and a portion of his stock; the new tenant also operated a jewelry store in the space and paid the same rent formerly paid by plaintiff. All except one of the other tenants in the building remained until the building was actually wrecked some seven months later; the tenant (other than plaintiff) who vacated had already acquired another location and defendants turned over to the Red Cross, rent free, the space he had occupied. Thus, the immediate net result of the giving of the termination notices was a loss of rental income to defendants.

Meanwhile, on January 4, 1945, defendants filed with the War Production Board a formal application for the permit to build; it was refused on January 23. Defendants, however, did not abandon their project nor is there any suggestion that they were released by their lessors from the obligation to build. They continued their efforts to complete the project and, after two more permit applications had first been presented and denied, war developments became more favorable and they were able in August of 1945, to complete the razing of the old building and ac•

tually commence construction of the new one.

Concerning the reason for giving the termination notice to plaintiff prior to the formal granting of a permit by the board, defendant testified that waiting for issuance of the permit would have meant a two-months' delay in construction of the new building, and that the loss of the difference in rent between that paid by tenants of the old building and that to be paid by the J. C. Penney Company for the new structure was "a small consideration * * * I wanted to build the building. I had a contract with the owner of the lot to build a building. Everybody wanted me to build the building." Certainly we should recognize that defendants were under obligations to keep good faith with their lessors as well as with their subtenants. The situation insofar as good faith is concerned would not have been materially different if the War Production Board had previously granted a permit and, upon adverse war developments, had cancelled it.

The trial court was of the view that plaintiff could recover only if he established bad faith by defendants in the giving of the notice, and that no evidence had been produced tending to show such bad faith. Accordingly, defendants' motion for a directed verdict was granted (see In re Estate of Flood (1933), 217 Cal. 763, 768, 21 P.2d 579; Burgess v. Cahill (1945), 26 Cal. 2d 320, 321-322, 158 P.2d 393, 159 A.L.R. 1304) and this appeal followed.

Both parties agree that inasmuch as no evidence was introduced to show the meaning of the termination provisions of the lease, the construction thereof is a question of law for the court and that no issue of fact is presented. Plaintiff contends, however, that because at the time the notice was given defendants admittedly did not have the permit and did not intend to build without it, the notice was premature as a matter of law and, necessarily, that although it would have been wholly ineffective as a basis for an unlawful detainer action and could have been disregarded by plaintiff, it entitled plaintiff to vacate the premises and claim damages. Although no California decision on this precise point has been discovered, plaintiff relies upon Woods v. Postal Telegraph-Cable Co. (1920), 205 Ala. 236, 87 So. 681, 27 A.L.R. 834; Clise Inv. Co. v. Stone (1932), 168 Wash. 617, 13 P.2d 9; and Donohue v City of New York (1907), 54 Misc. 415, 105 N.Y.S. 1069. It may be noted, however, that none of these cases was an action for damages after surrender of possession with knowledge of all pertinent facts; on the contrary, Woods and Clise were actions seeking to dispossess tenants and Donohue v. City of New York was an injunction suit brought by plaintiff to restrain interference with his possession of leased premises. In each of such cases the court determined that the contingency permitting termination of the involved lease had not arisen.

[1, 2] We are of the view that regardless of whether the notice received by plaintiff here, prior to actual issuance of the permit, would have supported a possible unlawful detainer action by defendants, the trial court correctly determined, in the light of all the circumstances shown, that in order for plaintiff to recover damages for constructive unlawful eviction, or on any conceivable appropriate theory, it was incumbent upon him to establish bad faith by defendants and that no evidence was introduced which on any tenable view could support a finding of bad faith. (See Donohue v. City of New York (1907), supra, 54 Misc. 415, 105 N.Y.S. 1069, 1070; Woods v. Postal Telegraph-Cable Co. (1920), supra, 205 Ala. 236, 81 So. 681, 27 A.L.R. 834; Southeastern Land Co. v. Clem (1931), 239 Ky. 417, 39 S.W.2d 674, 676.) Especially is this true where, as here, plaintiff was fully informed of all the facts prior to the date he vacated and was offered an opportunity to remain. The following language from Gibson v. Thisius (1943), 16 Wash.2d 693, 134 P.2d 713, 714, is particularly in point here: "It has been broadly stated in some cases that mere notice to quit, followed by vacation of the premises by the tenant, is sufficient to constitute a constructive eviction—or, at least, to make an issue of fact for the jury. We think, however, there will be found in all such cases harassing incidents disturbing to

the tenant's peaceful possession occurring on the property. That is the situation presented in Hobson v. Union Oil Co., 187 Wash. 1, 59 P.2d 929, where we held that the question as to whether there was an eviction or a voluntary surrender by the tenant was one of fact for the jury. That decision does not impair the force of former decisions of this court adhering to the rule that, to constitute a constructive eviction, some substantial interference by the landlord which is injurious to the tenant's beneficial use and enjoyment of the premises must occur. Ralph v. Lomer, 3 Wash. 401, 28 P. 760; Wusthoff v. Schwartz, 32 Wash. 337, 73 P. 407; Tennes v. American Building Co., 72 Wash. 644, 131 P. 201; Cline v. Altose, 158 Wash. 119, 290 P. 809, 70 A.L.R. 1471.

[3] "A threat made in good faith to resort to legal process does not constitute duress. Zent v. Lewis, 90 Wash. 651, 156 P. 848; Ingebright v. Seattle Taxicab & Transfer Co., 78 Wash. 433, 139 P. 188; Investment & Securities Co. v. Adams, 192 Wash. 41, 72 P.2d 288. By the same token, it cannot amount to a constructive eviction. Whether or not the threat is made in good faith may or may not be a question of fact for the jury to decide. That depends upon the state of the evidence. In this record there is not a scintilla of evidence from which it can be inferred that plaintiff acted in bad faith in threatening defendants with a suit for treble damages. On the contrary, the evidence is conclusive that he acted not only in good faith but also with probable cause."

In further support of our view on this matter is an opinion rendered on June 16, 1949, by the Appellate Department of the Superior Court in Los Angeles, in the case of Nyulassie v. Mozer (No. Civ. A 7057), in which plaintiff sought damages by reason of a notice to quit which allegedly contained representations of fact known by defendant to be false, acted upon by plaintiff to his damage. The assertedly false statement was that defendant wanted the premises for immediate occupancy by his son and daughter-in-law. Defendant had no daughter-in-law at the time the notice was given, but expected his son to marry approximately two months later. These facts were fully known to plaintiff, who vacated and then sued for damages. The court, in reversing a judgment for plaintiff, stated, "The evidence is insufficient to support the conclusion that defendant's purpose, when he served the notice on the plaintiff, was other than that represented, that is, so that his son and daughter-in-law-to-be would occupy the premises. 'The cases are legion to the effect that fraud will not be presumed and that proof thereof must be clear, convincing and unequivocal.' [Citation.]"

[4, 5] It clearly appears that at all times concerned defendants here acted with a bona fide intention to fulfil their contract with the landowner, with which contract plaintiff was acquainted, by razing the existing building and replacing it with a new structure, that they earnestly and diligently proceeded with the contemplated project and that they completed it as soon as was reasonably possible under the circumstances shown. That project was at no time inherently unlawful; on the contrary, it was but an exercise of a right which is an incident of the ownership of property, the freedom of which is basically protected by the Constitution. Primarily, but subject to general laws within the constitutional scope, that right is limited only by the private contract of the owner. Under war conditions its exercise was temporarily subject to additional regulations, but it should not be regarded as having been at any time completely nonexistent. On the contrary, it was one of the rights which this country was fighting to preserve.

Certainly there was unforeseen delay (approximately seven months) in attaining completion of the project, but that delay was due solely to causes beyond the control of defendants. It was through no fault of theirs that the United States and its allies suffered a temporary serious reversal in the Battle of the Bulge and that, as a result thereof, the War Production Board receded from the practice which it had been following, withdrew its theretofore suggested tentative approval of the project and denied, temporarily, issuance of the formal permits which the law and regulation transiently required as a condition to defendants' procurement of materials for the construction of the new building. As already pointed out, defendants persisted in their efforts to secure the required permits, at no time abandoned their declared and perfectly lawful intention of living up to their contract to erect the new building, and actually did begin work on such building promptly when the controls were eased and such work was permissible. The purpose of the notice fitted the obligation of the sublessors and the language of the sublease: the existing improvements were in truth "to be torn down to *make way* for the erection of a new building." (Italics added.)

It further is undisputed that defendants promptly and frankly disclosed to plaintiff the fact that because of the course which the war was taking the date of securing of the permit had become uncertain, and they offered to permit plaintiff to remain in possession on a short term basis until it could be more definitely ascertained when erection of the building would be allowed. The representative of defendants told plaintiff "that we were not at all sure of getting this permit and I wanted them to know just as soon as possible so they could continue to stay in business until we knew what the answer was going to be." Nevertheless, plaintiff moved out of the premises while defendants were still attempting to secure the formal permit to proceed but before it had definitely been learned whether the work could then proceed or would have to be deferred pending war developments.

By the exigencies of war and wartime regulations the defendants appear to have been caught between the millstones of their obligations to their lessors on the one hand and to their subtenants on the other. Courts should not lightly permit such exigencies to be seized upon as a basis for assessing damages against those who in entire good faith gave a termination notice to a subtenant, which notice the givers believed they had a right to give, in an effort to perform an obligation to which they were bound, and where, upon learning that uncertainty existed as to their securing the governmental permit at the time first fixed, they immediately advised their subtenant of the fact and offered to allow the subtenant to remain pending the uncertainty. From its inception the plaintiff's sublease was potentially subject to termination on various contingencies; he was aware of the obligations and rights of defendants under the McGill lease; he knew, as well as defendants, the extent of and the limitations on the right of defendants to terminate his sublease. And likewise he knew, as well as did defendants, the circumstances upon which the right of defendants to give the termination notice depended. Plaintiff urges that the notice was premature as a matter of law. If in truth it was premature then it was legally ineffective and plaintiff could have remained in possession of the premises until a proper and timely notice to vacate was given. The facts were not concealed from him. We are satisfied that under these circumstances the mere giving of the notice did not constitute a constructive eviction and that by voluntarily departing from the premises, having full knowledge of all the facts which he now claims rendered the notice premature, he precluded the raising of any such question as would have arisen if he had chosen to remain in possession and resist a possible unlawful detainer action.

The judgment of the trial court is affirmed.

GIBSON, C. J., and SHENK, and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting).

I cannot agree with the conclusion that "* * * there was no evidence legally sufficient to show bad faith, constructive eviction, or any unlawful act by defendants." This is tantamount to a holding that whenever a lessor believes that he is, or soon will be, acting legally, he may not be guilty of an actual or constructive eviction. On the contrary, in my opinion, the evidence in this case compels the conclusion, as a matter of law, that the MacDonalds evicted Lindenberg and are liable for any damages sustained by him.

The terms of the lease under which the property was rented are determinative of the rights of the parties. If under the lease, the notice to vacate was premature and, therefore, without effect, the subsequent lease to Penney during the unexpired term of Lindenberg's lease constituted an actual eviction of the prior lessee. Moreover, if under the circumstances shown by the record, the terms of the lease did not allow a termination of the tenancy, the notice served upon Lindenberg constituted a constructive eviction of him. That notice was given in conjunction with the harassing threat of imminent destruction of the existing building and was followed by insistence that Lindenberg remain, if at all, upon a tenuous month to month basis.

The lease to Lindenberg included the following provision: "Lessor may terminate this lease in the event that the existing improvements are to be torn down to make way for the erection of a new building on sixty (60) days written notice addressed to the lessee. * * *" In the latter part of 1944, following negotiations with J. C. Penney Company for a long term lease of a building to be constructed for them replacing the one occupied in part by Lindenberg, MacDonald served the following notice on his lessee: "Arrangements have been made to tear down the building which you now occupy and a new building will be erected thereon as soon as you and other tenants have moved. All tenants have been notified. Therefore I am now giving notice as required by the lease, for you to vacate the premises at 407 Georgia Street not later than January 31, 1945. I regret that you have to move at the present time, as I know the difficulties of finding a suitable location under the present conditions, but in order for me to make certain arrangements which I must do in Vallejo, I must erect this new building now. * * *"

The MacDonalds' formal application to the War Production Board for the necessary building permit was filed on January 4th. On January 13th, after Lindenberg was given an opportunity to remain on a month to month basis, he vacated the premises. Ten days later, the application for a building permit was denied. During the following April and June, the board made the same ruling on subsequent applications. In August, the permit was obtained and the construction of a new building was commenced. The Lindenberg lease then had an additional four months to run.

The interpretation of any written instrument derived solely from the language of the writing itself, unaided by extrinsic evidence of the intent of the parties or the surrounding circumstances, is always a question of law, not of fact. In re Estate of Janes, 18 Cal.2d 512, 515, 116 P.2d 438; 9 Wigmore on Evidence [3rd Ed.], § 2556, p. 522; 6 Cal.Jur. [Contracts, § 193] 328. In the present case, there being no such evidence, the question of the lessors' liability turns upon the meaning, as a matter of law, of the phrase in the lease allowing it to be terminated where existing buildings "are to be torn down." Upon oral argument, counsel for both parties agreed that the construction of the lease presents an issue of law which governs the rights of the parties.

The MacDonalds argue that the language "existing improvements *are to be* torn down to make way for erection of a new building" requires nothing but a good faith intention or hope on the part of the landlord. The position of Lindenberg is that, although good faith is an implied condition of every contract, "intention without ability to perform does not mean anything." There is considerable evidence that the MacDonalds gave the notice in a good faith belief that they would be able to rebuild, but the testimony is unconflicting that they did not have, nor believe that they had a present ability to carry out such intention at the time they directed Lindenberg to vacate.

There are certain rules which must be considered in interpreting the lease provision. "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." Civ. Code, § 1442. Also, uncertainties in an agreement are to be interpreted most strongly against the one who prepared it.

Civ.Code, § 1654; Pacific Lumber Co. v. Industrial Comm., 22 Cal.2d 410, 422, 139 P.2d 892. To hold, as the trial court did, that a good faith desire to build is the only requirement for termination, is to construe the lease most favorably to the lessor and to take from the lessee any unqualified right to occupy the premises for a term longer than sixty days, the period specified for giving notice of termination. A far more reasonable construction of the contract is that the language authorizing a termination of the lease if and when the existing improvements were to be replaced by a new structure required as a basis for termination of the lease an unconditional and present right to build. The notice given by the MacDonalds follows this construction of the terms of the lease for it stated: "Arrangements *have been made* to tear down the building * * * and a new building will *be erected thereon as soon as you and other tenants have moved.*" By this notice Lindenberg was led to believe that the MacDonalds had a present ability, as required by his contract with them, to build the new structure. Yet the uncontradicted evidence is that no such ability existed at the time the notice was given.

The MacDonalds admittedly knew that they could not legally erect a building without a permit from the War Production Board. They also were aware that the issuance of such a permit was within the discretion of the board. The owners had no certainty that such a permit could be obtained; indeed, their knowledge of the lack of binding effect upon the board of any tentative opinion of its local officers is conclusively shown by the record. Other evidence, clear and uncontradicted, is that the action of the MacDonalds in connection with the demolition of the existing building and the erection of a new one was with knowledge of the board's requirement for the submission of construction plans before any formal approval would be given. The owners make no claim that they acted without full knowledge either of the facts or the law, or with any intention to build without a permit.

The record, therefore, clearly shows that the unconditional notice to vacate was based upon a conditional right to build. The lease did not allow a termination of the tenancy in the event existing improvements "possibly may be razed" or "probably will be replaced." The contract of the parties, without any qualification whatever, was that the tenancy might be terminated when the buildings "* * * are to be torn down. * * *"

Implicit in any determination of present ability to build is that there be no controlling discretion in third parties. Woods v. Postal Telegraph-Cable Co., 205 Ala. 236, 87 So. 681, 27 A.L.R. 834. The permit from the War Production Board was a condition precedent to a lawful right to build, and until it was obtained the lessors had nothing but a hope that soon they might begin construction. In no sense did they have the present unconditional ability to commence the construction of the improvement mentioned in the notice of termination. Moreover, the lessors did not have the right, nor by their own admission did they have the intention, to evict Lindenberg, raze the then existing structure and leave the land vacant until such time as they could put a new building upon the property. Donohue v. City of New York, 54 Misc. 415, 105 N.Y.S. 1069; Southeastern Land Co. v. Clem, 239 Ky. 417, 39 S.W.2d 674. Under these circumstances, as a matter of law, the notice was ineffectual to terminate the lease.

A tenant is evicted where, before the expiration of his lease, the landlord rents the demised premises to another person, who takes possession of them without the tenant's consent. Cornerstone Building & Loan Ass'n of Newark v. Tallman, 185 A. 361, 14 N.J.Misc. 375; Ellison v. Charbonneau, Tex.Civ.App., 101 S.W.2d 310. This is true although the tenant previously has vacated the premises. Higgins v. Street, 19 Okl. 45, 92 P. 153, 13 L.R.A., N.S., 398, 14 Ann.Cas. 1086. In this case, the MacDonalds leased the premises and commenced to tear down the building in which Lindenberg's store was located four months before the expiration of his lease. There is no conflict in the evidence concerning his desire to remain in possession for the remainder of the term of his lease rather than to occupy the store on a month to month basis subject to the Penney lease. He vacated only because of the compulsion of his lessors, and his eviction was not cured by the landlords' offer to allow him to remain on a short term basis.

Further, the record warrants the conclusion that Lindenberg was constructively evicted. "Any disturbance of a tenant's possession by a landlord or by someone acting under his authority, whereby * * * the tenant is deprived of the beneficial enjoyment of the premises, amounts to a constructive eviction." Giraud v. Milovich, 29 Cal.App.2d 543, 547, 85 P.2d 182, 184; Riechhold v. Sommarstrom Inv. Co., 83 Cal.App. 173, 256 P. 592. "* * * [I]t is not necessary that there should be an actual ouster, to constitute an eviction, but * * * any act of the lessor which results in depriving his lessees of the beneficial enjoyment of the premises constitutes an eviction." Agar v. Winslow, 123 Cal. 587, 593, 56 P. 422, 423, 69 Am.St.Rep. 84.

A lessor's unjustified written notice to a lessee to vacate may, alone, constitute constructive eviction. "* * * [T]he law is that such notice, * * * is constructive eviction; that it is not necessary for the tenant to wait until ejectment proceedings are instituted." American Jewelry Co. v. Barrs Self-Driver Co., Inc., 48 Ohio App. 239, 192 N.E. 865, 866; see also 52 C.J.S., Landlord and Tenant, § 458, page 179. And when the lessor has evidenced the requisite intent to evict and thereby deprive the lessee of his beneficial enjoyment of the demised premises, the lessee is entitled to abandon the property and consider himself constructively evicted.

In the present case, the unauthorized notice to vacate was coupled with the statement that the existing buildings were to be razed immediately. The lessor had negotiated and entered into another lease, and Lindenberg was told that he might remain, if at all, only under a month to month lease. These factors constituted interference with his beneficial enjoyment under his three year lease, and show, as a matter of law, that he was constructively evicted. Accordingly, he has a cause of action for the resulting damages. Beckett v. City of Paris Dry Goods Co., 14 Cal.2d 633, 96 P.2d 122; Cappuccio v. Tufts, 109 Cal.App. 274, 293 P. 91; Saferian v. Baer, 105 Cal.App. 238, 287 P. 142.

I would, therefore, reverse the judgment and remand the cause for a new trial upon the issue of damages.

TRAYNOR, J., concurs.

CARTER, Justice.

I dissent.

I find myself in the middle of two extreme positions as I cannot agree with the opinion of either Justice Schauer or Justice Edmonds.

We have a case here in which a landlord, under a provision in a lease, may terminate a lease on sixty days' notice if the building presently on the property covered thereby is to be removed and a new one erected. Pursuant to that option the lessor gives to the tenant an *unequivocal* notice that the lease is terminated and the lessee must vacate. Acting in response to that notice, not of his own volition, the tenant vacates the property. He then brings an action for damages for eviction (or for a breach of the covenant of quiet enjoyment), asserting that the landlord had no right to terminate the lease because when the notice was given, governmental restrictions made it unlawful to construct buildings without obtaining permission from the War Production Board and such permission had not been obtained. Now that issue, namely, did the termination clause justify a termination of the lease under the conditions present (hereafter referred to as termination issue), is the *only* issue *ever* presented in the case until Justice Schauer injects a new question, that is, did such termination constitute an eviction. It was alleged by the plaintiff-tenant and *not denied* by the defendant-landlord, "That on or about November 28, 1944, defendants, by instrument in writing, *terminated* said lease and *ordered plaintiff to vacate* said premises as of January 31, 1945." [Emphasis added.] The parties never doubted that a termination of the lease was accomplished by the notice and that, as such *it constituted an eviction of the tenant.* The sole question was the termination issue. The issue was so stated to the jury in the lessor's opening statement, and in his motion for a directed verdict (which was granted and is here involved), lessor's counsel said: "And the other case is Southeastern Land Co. v. Clem, 239 Ky. 417, 39 S.W.2d 674, where the Court said that where a lease is terminable only on certain conditions, the lessor cannot terminate the lease except in pursuance of a bona fide intent to carry out the improvements on the property referred to.

"And that is exactly *all we are concerned with here.* There is no reason why we should be compelled to have a jury pass on this thing, in view of the evidence here, because the situation is such that reasonable men could not differ on the conclusion to be reached. Can any reasonable person say that these people did not have a bona fide intent of wrecking that building and going ahead with the improvements within a reasonable time after that notice took effect?" [Emphasis added.] The motion for a directed verdict was granted. Thus the trial court did not at any time pass upon the eviction question.

As I understand Justice Schauer's opinion, he *does not decide* the termination issue. He tacitly assumes that the notice of termination and to vacate was *not* proper under the lease and existing circumstances. He then holds that *a notice to vacate, if given by the lessor with a good faith, though erroneous, belief that he was entitled to give it, followed by a vacation of the premises by the tenant, does not constitute an eviction.*

In the first place, it should be clear that giving a wrongful but unequivocal notice of termination of the lease and to vacate, which amounts to a demand for possession, followed by a vacation of the premises by the tenant as a result thereof, should alone constitute a constructive eviction, and it has been so held. Eggers v. Paustian, 190 Iowa 638, 180 N.W. 873; American Jewelry Co. v. Barrs Self-Driver Co., 48 Ohio App. 239, 192 N.E. 865. Indeed, that should be the law for the lessor has taken the initial step and position that the tenant should get out. The tenant should be entitled to rely upon such action by the landlord, and the latter should run the risk of whether he is right or wrong in his termination of the tenancy. The tenant should not be required to take the chance and face an unlawful detainer action wtih its harassment and expense, together with the uncertainty of his tenancy. If the circumstances were reversed and the tenant repudiated the lease, he would assume the risk of the legality of his stand. In contract law, it cannot be doubted that an unequivocal repudiation of the contract by the promisor is not only justification for the promisee's failure to perform thereafter, but gives an immediate cause of action for damages. Gold Mining & Water Co. v. Swinerton, 23 Cal.2d 19, 142 P.2d 22.

Moreover, in the instant case we have more than a mere notice to quit. As heretofore seen, the lessor *admitted* that the lease was *terminated* by the notice and that the tenant must vacate. The lessor was adamant in his talks with the lessee that he must vacate. What more is necessary to constitute an eviction?

If it be assumed that Justice Schauer holds (and it seems to be the case) that, although there may have been an eviction by reason of the notice, yet such does not occur if the lessor believed in good faith that he had a right to terminate the lease. In other words, a lessor may evict a tenant and breach the covenant of quiet enjoyment with immunity from damages if he honestly believes he has legal ground for the eviction, even though he is clearly wrong. With that I can not agree. In most instances the promisor's or lessor's claim for possession is in good faith, but if he is wrong, he is liable. It is no excuse for a breach of contract that the promisor honestly thought he was justified in breaking it. In any event, however, the question of whether the landlord acted in good faith is one of fact.

In regard to the termination issue, it appears that the generally accepted rule is that the lessor cannot terminate the lease unless he in good faith intends and has a reasonable expectancy of being able to erect a building on the property. "Where a lease is terminable only on certain conditions, the lessor cannot terminate the lease, except in pursuance of a bona fide intent to carry out the purpose referred to." Southeastern Land Co. v. Clem, 239 Ky. 417, 39 S.W.2d 674, 675. See also, Dubois v. Gentry, 182 Tenn. 103, 184 S.W.2d 369; Clise Inv. Co. v. Stone, 168 Wash. 617, 13 P.2d 9; 163 A.L.R. 1034. In such a case, in order to justify the termination of the lease, the burden of proof is on the lessor to show he was entitled to terminate it. The tenant in the eviction action shows the eviction. It is then incumbent on the landlord to show he in good faith intended to build and had an honest and reasonable expectancy that he would. In Allen v. Kilpatrick, 277 Mass. 237, 178 N.E. 511, 512, the lessor had the option of terminating if the premises were rendered unfit for habitation by fire, and in the eviction action the court said: "The burden of proving justification of termination of the tenancy was on the defendants [landlord]." In the instant case, the case should have been submitted to the jury. It could have disbelieved the lessor's evidence that he "felt" he could get a permit to build and thus the burden would not have been sustained. Taking the evidence outlined by Justice Schauer, it appears that no permit had been obtained prior to the notice of termination; in fact, *it does not appear that an application for a permit had even been made.* Yet the lessor said in his notice that arrangements *had been made;* they had not. It was not until after the notice (at least the lessor did not prove the contrary) that an architect for the new building was employed. These and other factors would justify the jury in inferring that there was no good faith intent to construct the new building or a reasonable probability of accomplishment. It is no answer to say that the landlord wanted to get his notice in early to avoid the 60-day delay. The sixty-day period *was for the lessee's benefit.* He was justified in insisting that it not run until good faith arrangements had been made for a new building. The burden was on the landlord to prove that such arrangements had been made. This presented an issue of fact for the jury and the trial court erred in granting defendants' motion for a directed verdict.

I would, therefore, reverse the judgment.

Rehearing denied; EDMONDS, CARTER, and TRAYNOR, JJ., dissenting.

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95 Cal.App.2d 840

PEOPLE v. JIMINEZ.

Cr. 2148.

District Court of Appeal, Third District, California.

Feb. 2, 1950.

Oscar Hobomono Jiminez was convicted of first-degree murder, in the Superior Court, San Joaquin County, George F. Buck, J., and he appealed.

The District Court of Appeal, Peek, J., held that evidence was insufficient to sustain conviction of murder in first degree but was sufficient to sustain a modified judgment of murder in the second degree.

Judgment modified and affirmed.

1. Criminal law ⚷254

Where evidence is open to two equally reasonable constructions, one of which points to guilt of defendant of a higher degree of crime, and other to his guilt of a lesser degree thereof, the court must adopt that theory pointing to guilt of lesser degree. Pen.Code, § 1097.

2. Homicide ⚷22(2)

A specific intent to kill does not constitute a homicide murder in first degree unless such intent has been reached by deliberation and premeditation. Pen.Code, § 189.

3. Homicide ⚷22(2)

"Murder of the first degree" is only such if it is the result of deliberation and premeditation. Pen.Code, § 189.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Murder of First Degree".

4. Criminal law ⚷351(3)
Homicide ⚷253(3)

In homicide prosecution, flight of defendant after a crime was relevant to prove guilt, but where defendant had confessed to homicide, the fact of flight alone, was not a basis to show premeditation and deliberation. Pen.Code, § 189.

5. Homicide ⚷253(3), 347

Where defendant admitted killing and flight after crime, and death was caused by several cruel knife wounds, and evidence presented court with two theories, either showing premeditation and deliberation or the lack of it, evidence was insufficient to sustain conviction of murder in first degree, but was sufficient to sustain judgment of murder in second degree and Appellate Court would modify judgment by reducing crime to murder in second degree. Pen. Code, § 189.

◆

Anthony J. Chargin, Stockton, for appellant.

Fred N. Howser, Attorney General, C. J. Scott, Deputy Attorney General, for respondent.

PEEK, Justice.

By an information filed by the district attorney of San Joaquin county the appellant was charged with murder. Upon his arraignment he entered pleas of not guilty and not guilty by reason of insanity which pleas were subsequently withdrawn and a plea of guilty entered to the crime charged. The court, after receiving evidence as to the degree of the offense pursuant to Section 189 of the Penal Code, determined it to be murder of the first degree and sentenced defendant to life imprisonment. His motion for a new trial and for a modification of the judgment were denied and he now appeals from the order denying said motion and from the judgment so imposed.

The record shows that the twenty-one year old appellant is a citizen of Mexico who has resided in California since 1945, residing with decedent's family near the city of Lodi for approximately seven months prior to the murder. While he ate his meals with the family his actual living quarters were located under a tree approximately one hundred feet from the house.

The evidence primarily consists of the testimony of the appellant who testified that he and the decedent, Clotilde Vasquez, were engaged to be married; that he customarily met his fiancee upon her return home from her night job in a Lodi cannery and did so meet her about 1:30 a. m. on the morning of the homicide and that they proceeded to a nearby vineyard. He further testified that during the course of their conversation she informed him of her intention to go to school in San Francisco and requested him to postpone their wedding until she had concluded her contemplated schooling; that she became angry upon his refusal to do so and his statement that he did not wish to wait any longer; that he too became angry and drew a pocket knife with the intent to "afraid her" but that in his anger he lost his head and fatally stabbed her. Appellant admitted that he fled the scene of the crime without knowing whether or not Clotilde was dead and boarded a bus bound for Los Angeles. Upon his arrival there he changed his name and secured employment with a railroad company by whom he was employed until his apprehension and return to Stockton.

One of the brothers who found her body in the vineyard the following morning testified that the ground nearby appeared "scuffled up". He further testified that the decedent had told him she "might marry" the defendant but that she "wasn't, * * * well, too certain about it." Another brother who had searched appellant's living quarters testified that from a distance the bed appeared to be occupied but upon closer examination he found that a blanket had been used so as to cause it to appear that a person was sleeping in it.

The county autopsy surgeon testified that death resulted from a stab wound which penetrated the chest and the right side of the heart, causing a massive hemorrhage. He further testified that "there were also other stab wounds, two of the stab wounds were in the chest, anterior, four were in the back and one was in the left forearm." He characterized the wounds as "penetrating", indicating the use of "some force" of "a very sharp instrument." No further evidence was introduced.

Defendant's sole contention is that the foregoing evidence is insufficient to sustain the determination of murder of the first degree, in particular he contends that it fails to prove that the admitted murder was deliberate and premeditated. Both defendant and respondent agree that if the murder is one of the first degree it is so only because the foregoing evidence establishes that it was a "willful, deliberate, and premeditated" killing within the meaning of Section 189 of the Penal Code.

Respondent maintains that the evidence is sufficient to sustain the judgment and observed that to "adopt defendant's appraisal of the evidence would mean that no longer in California could a first degree murder finding stand unless there were either eye witnesses of the homicide or unless the defendant voluntarily stated that he had fully premeditated and deliberated the killing. The administration of justice in this state will not be so thwarted." This court feels as deep a concern for the administration of justice as does respondent. While "justice" is a term difficult to define, we are convinced that it does not include the affirmance of judgments unsupported by substantial evidence and we think that respondent would share our conviction. We will therefore consider the evidence and arguments in support thereto and render our decision accordingly.

[1] As evidence of premeditation and deliberation respondent refers to the testimony of decedent's brother that she informed him of her plan to go to San Francisco and argues that by reason of the relationship existing between her and appellant that it is reasonable to infer that she had informed appellant of her plans prior to the evening of the homicide and that therefore he accompanied her to the vineyard in a final but vain effort to dissuade her from going to school. Such argument is patently unsound. If it is reasonable to infer that because decedent informed her brother of such plans she likewise informed appellant, it is equally reasonable to infer that decedent discussed her plans not only with her immediate family but with other persons as well, but because of defendant's ardent love for her and knowing that a postponement of their marriage would cause him great unhappiness he would be the last one she would inform of her decision. Under such circumstances courts are bound by the rule that "where evidence is open to two equally reasonable constructions, one of which points to the guilt of the defendant of a higher degree of a crime, and the other to his guilt only of a lesser degree thereof, the court must adopt that theory pointing to guilt of the lesser degree." People v. Golembiewski, 25 Cal.App.2d 115, 118, 76 P.2d 717, 719; Penal Code Section 1097. See also People v. Daniel, 65 Cal.App.2d 622, 151 P.2d 275.

[2, 3] Respondent in further support of the judgment refers to the evidence that the killing was accomplished by means of a knife and the number and location of stab wounds inflicted upon the decedent. While it is true that a specific intent to kill may be inferred from the use of such a knife as herein involved, a specific intent to kill does not constitute a homicide murder in the first degree unless such intent has been reached by deliberation and premeditation. People v. Bender, 27 Cal.2d 164, 163 P.2d 8; People v. Thomas, 25 Cal.2d 880, 156 P.2d 7. Furthermore the suggestion by respondent that the fatal injuries were inflicted with intent to cause cruel suffering and that therefore the murder was of the first degree is wholly inconsistent with the proper concession made in its brief that the murder is one of first degree only if it were the result of deliberation and premeditation. Even if such were not the state of the record the recent case of People v. Tubby, 34 Cal.2d 72, 207 P.2d 51, would appear to be

a complete answer to respondent's argument on this point.

Respondent lastly refers to certain actions of the defendant subsequent to the commission of the crime. Particularly it calls attention first, to the testimony of decedent's brother that defendant's bed was made to appear as though it were occupied, and secondly, to his flight from the scene of the crime as evidence of deliberation and premeditation.

The only evidence relative to the condition of defendant's bed was given by one of decedent's brothers who testified that on the morning following the homicide he observed the bed from a distance and it looked like some one was in it but that upon closer examination he found that a blanket had been used to make it appear as though a person was sleeping there.

It might well be that under certain circumstances such evidence would be some indication of premeditation. However, in the absence of any showing other than that the condition existed on the morning following the homicide we are presented with the identical problem previously discussed concerning decedent's desire to further her schooling and for the same reason the argument of the prosecution on this point is likewise without merit. People v. Golembiewski, supra.

[4] The essence of respondent's final argument regarding the flight of the defendant as evidence of deliberation and premeditation appears to be that since the court in the case of People v. Fowler, 178 Cal. 657, 174 P. 892, upheld a refusal of the trial court to instruct the jury therein that flight was not evidence of deliberation and premeditation that therefore the flight of the defendant herein is evidence of such necessary element of the crime of first degree murder. We do not understand that case to so hold. The discussion of the court therein on this point shows that because the instruction would have eliminated flight from consideration by the jury even as evidence of guilt the court held it to be an incorrect statement of the law. In particular the court stated, 178 Cal. at page 673, 174 P. at page 898, that "flight was a circumstance to be considered, in connection with other evidence, in determining the degree of guilt, on a charge of murder of the first degree * * * though not of itself sufficient to establish guilt * * * the fact that the defendant fled was a circumstance to be considered as tending to show guilt of the crime, though not of itself sufficient to create a presumption of guilt." Thus the flight of the defendant herein was relevant for the reasons above mentioned but inasmuch as defendant had confessed to the homicide the fact of his flight standing alone as it is without any other evidence in the record tending to show premeditation and deliberation it necessarily follows that such fact is patently not a basis for respondent's argument in support of the judgment.

[5] For the foregoing reasons the order denying the motion for a new trial is affirmed; the judgment is modified by reducing the degree of the crime to murder of the second degree, and as so modified the judgment is affirmed, and the cause is remanded to the trial court with instructions to sentence the defendant to imprisonment for the term prescribed by law for murder of the second degree.

ADAMS, P. J., concurring.

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95 Cal.App.2d 872

HOLDEN v. JOHNSON et al.

Civ. 3863.

District Court of Appeal, Fourth District, California.

Feb. 3, 1950.

Hearing Denied March 30, 1950.

Action to quiet title by Howard M. Holden against Ben F. Johnson, wherein defendant filed a cross-complaint against plaintiff and Roy R. Strotz, and wherein cross-defendant filed a cross-complaint against plaintiff.

The Superior Court of San Bernardino County, Stanley Mussell, J., rendered judgment for defendant and cross-defendant, and plaintiff appealed.

The District Court of Appeal, Barnard, P. J., held that plaintiff as vendor had waived his right to declare a forfeiture under a contract for the sale of real property because of failure of purchaser to make prompt payment of installments where vendor accepted installments after they became due.

Judgment affirmed.

1. Vendor and purchaser ⚷80

Evidence supported finding that lot sold to purchaser as pointed out on the ground at the time of sale was lot 26 and not lot 27 as appearing on a map recorded after the purchase so as to require vendor to convey such lot.

2. Vendor and purchaser ⚷187

Enforcement of default against purchaser of lot because of delay in payment of instalments was properly refused on ground that waiver of prompt payment was shown, where vendor accepted instalments after they became due and advised purchaser that payments could be delayed.

3. Vendor and purchaser ⚷93

Where purchaser deposited full balance due for lot purchased with a title company, notified vendor that he was ready to complete transaction but vendor refused to furnish a deed and certificate of title, and refused to complete transaction, vendor could not, about six months later, declare a forfeiture on ground that instalments were not timely paid.

4. Trial ⚷397(3)

In action by vendor to quiet title to a lot where no issue was raised in the trial court as to who was entitled to improvements placed on the lot, failure of trial court to make a finding thereon was not error.

5. Vendor and purchaser ⚷208

Where vendor mistakenly believed that purchaser had lost all his rights by failing to make installment payments on time under a contract, vendor acted at his peril in attempting to sell property to another without taking steps to terminate the purchaser's interest in the property.

◆

E. John Eriksson, Homer M. Bail, San Bernardino, for appellant.

Surr & Hellyer, San Bernardino, James R. Edwards, San Bernardino, for respondent.

BARNARD, Presiding Justice.

The plaintiff subdivided 80 acres of land near Big Bear Lake into so-called "acre lots", the lots being somewhat irregular in size and shape. In May, 1944, a survey of the property had been completed and stakes had been installed marking the lines of the respective lots, but no map of the proposed subdivision had been recorded. An old cabin stood on this property and the plaintiff agreed to sell this cabin, together with the lot upon which it stood, to the defendant Johnson. The purchase price was $400, payable $50 in cash with monthly payments of $25 payable on the 6th day of each month beginning June 6, 1944, with interest at 6%.

The main controversy here is as to whether the lot thus agreed to be sold and on which the cabin stood was Lot 26 as then staked out upon the ground, or whether it was in fact Lot 27 as that lot appears on the map which was recorded nearly two years later. There is evidence that Lot 26, as then staked out on the ground, had an irregular northerly line and included the land on which the old cabin stood. However, when the map of this subdivision was first recorded, on April 23, 1946, the northerly line of Lot 26 was shown as a straight line, thus placing the old cabin on Lot 27.

On May 6, 1944, a written contract was executed by which the plaintiff agreed to sell to Johnson on the terms above mentioned "all of lot described as acre number 26 in Holden Acres, Big Bear City, with the improvements thereon, as per map of said Tract now on record in the office of the Recorder" of San Bernardino County.

On May 26, 1945, the plaintiff entered into another contract to sell Lot 26 to Roy R. Strotz and Arthur G. Taylor for $500 on monthly payments. Johnson informed Taylor that he owned that lot by virtue of his contract of sale. Shortly thereafter, Strotz and Taylor began to construct a cabin on this lot and, subsequently, Taylor sold his interest to Strotz.

On April 11, 1946, the plaintiff brought this action to quiet his title to Acre 26, naming Johnson as the defendant. Johnson filed a cross-complaint against Holden and Strotz seeking a conveyance of Acre 26, as containing the site of the cabin, and to quiet his title as against Strotz. Strotz filed a cross-complaint against Holden seeking to recover the amount he had paid and the value of the cabin he had built, in the event it was found that Johnson had a superior title to the lot.

The court found in favor of the defendant Johnson finding, among other things, that on May 6, 1944, Holden had by contract sold to Johnson Lot 26, including the triangular portion containing the old cabin; that prior to entering into this contract of sale Holden had thus pointed out the property to Johnson, showing him its boundaries and stakes and representing these to be the correct boundaries of Acre 26; that Johnson, in reliance thereon, executed the agreement and took possession of the property which he has since retained; that Johnson believed that a map had then been recorded showing said Acre 26 to be bounded and described as pointed out by Holden and as found by the court; that on September 9, 1945, Johnson offered to pay Holden all sums remaining due under the contract upon receiving a deed and certificate of title as called for by the contract; and that the contract was fair and equitable and $400 was then the fair market value of the property. Further findings were made in favor of Strotz upon his cross-complaint. Judgment was accordingly entered requiring Holden to convey Lot 26, including the site of the old cabin, in accordance with the court's findings, to the defendant Johnson provided that Johnson paid, within thirty days, the balance due under the contract. The judgment further provided that in the event Johnson thus paid the balance due and acquired title to Lot 26, the cross-complainant Strotz should recover from Holden the sum of $1906.15, being the amount Strotz had expended in reliance upon his contract. From this judgment the plaintiff has appealed.

The appellant first contends that the evidence is not sufficient to support the findings with respect to the precise property he agreed to sell to Johnson. He contends that there was a mistake in inserting the lot number in the contract of sale; that the parties agreed that Lot 27 should be bought and sold instead of Lot 26; and that after the mistake was discovered Johnson refused to correct it. The appellant testified that he and Johnson looked at the property but did not locate the stakes; that Johnson wanted the cabin and "the land described that it stood on"; that they went to a real estate office to have a contract prepared; that the agent advised them to be sure they had the right description; that Johnson told the real estate agent that it was Lot 26; that they talked the matter over and were to verify the description "when we got a map of the thing"; that sometime the next summer he showed Johnson a map and asked him to have the contract changed to cover Lot 27; and that Johnson refused to do this.

At the time of the sale to Johnson no map had been recorded and none was shown to Johnson. The southerly side of Lot 26 faced on a main road, and there was an old road running across Lot 26 and going to the old cabin, which appeared to be on the northerly side of Lot 26. At that time there was no other road giving access to the old cabin. Johnson testified that the appellant showed him five stakes marking the boundaries of this lot. The boundaries thus pointed out, and indicated by the stakes, included the land on which the old cabin stood as a part of this lot which faced on the main road. Johnson testified that while they were at the real estate office the appellant insisted that this was Lot 26, that a question was raised about the description at the real estate office, and that they both went back to the land and verified the description and found that the appellant was right and that it was Lot No. 26. Johnson then occupied the cabin and continuously used the road across Lot 26. Two other witnesses testified that a little later when they wanted to buy Lot 26, facing the road, the appellant told them that it belonged to Johnson.

[1] The evidence, while conflicting, is amply sufficient to support the findings that

the land sold to Johnson, as pointed out on the ground at the time, was the land awarded to Johnson by the judgment.

The appellant further contends that Johnson was not entitled to any relief in this action because he was in default in his payments under the contract of May 6, 1944.

[2] There is evidence that Johnson paid $50 down on May 6, 1944, and that he paid another $25 on June 17, 1944, and $25 on July 31, 1944. Early in September, 1944, Johnson offered the appellant another payment and the appellant said that it was not due yet and he did not need it. In the spring of 1945, Johnson did some work for the appellant and there is evidence that the appellant agreed to apply a part of the wages, amounting to twenty-five dollars and some cents, on the contract for this lot. At that time Johnson wanted to apply all of the wages on the contract and the appellant told him "Let that go; you need the money" and not to worry about the contract. Every payment thus made by Johnson was late and was accepted by the appellant without objection. On two occasions the appellant advised Johnson that the payments could be delayed and he permitted Johnson to remain in possession of the property. Under these circumstances, a waiver of prompt payment appears and the court was justified in refusing to enforce a default against Johnson. Boone v. Templeman, 158 Cal. 290, 110 P. 947, 139 Am.St.Rep. 126.

[3] It further appears that in September, 1945, Johnson deposited the full balance due with a title company, and notified the appellant that he was ready to complete the transaction. The appellant refused to furnish a deed and certificate of title, and refused to complete the transaction. The appellant made no demand or attempt to claim a forfeiture until this action was filed in April, 1946. This was long after the payments on the contract were all due and it was then incumbent upon the appellant to tender a deed before he could declare a forfeiture. Boone v. Templeman, 158 Cal. 290, 110 P. 947, 139 Am.St.Rep. 126; Kerr v. Reed, 187 Cal. 409, 202 P. 142.

[4, 5] The appellant also contends that error appears in that the court made no finding as to who was entitled to the improvements placed upon Lot 26 by Strotz, it being argued that equity demands that the entire controversy be determined in one action. The question suggested would seem to be answered by section 1013 of the Civil Code. Moreover, no issue in that connection was raised in the trial court. According to his own testimony the appellant knew that Johnson claimed the land in question long before he attempted to sell Lot 26 to Strotz and Taylor. Apparently, his later sale of the property was based upon his mistaken belief that Johnson had lost all his rights by failing to make the payments on time. Be this as it may, the appellant acted at his own risk in attempting to sell the property to another without taking any steps to terminate Johnson's interest in the property.

The judgment is affirmed.

GRIFFIN, J., concurs.

MUSSELL, J., being disqualified, does not participate herein.

95 Cal.App.2d 838

KNIGHT v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 17647.

District Court of Appeal, Second District,
Division 1, California.
Feb. 2, 1950.

Proceeding in Superior Court, Los Angeles County, to try the incompetency of Mary Alice Knight; demand was made for a jury trial and denied, and Mary Knight petitioned for writ of prohibition.

The District Court of Appeal, Per Curiam, held that petitioner had a constitutional right to a jury trial in proceeding to try her incompetency and failure of Superior

Court to so allow jury trial exceeded its jurisdiction.

Prohibition issued to Superior Court with directions.

1. Jury 🔑19(1)

An alleged incompetent has the right to a trial by jury on the issue of incompetency.

2. Prohibition 🔑3(5), 4

Question of issuance of writ of prohibition is for sound discretion of court to which application is made, and in light of whether by reason of nature of proceeding and facts shown, an appeal would be a speedy and adequate remedy.

3. Prohibition 🔑10(3)

In view of constitutional right of every citizen to a trial by jury in a proper case, liberal use of writ of prohibition should be allowed, otherwise trial courts in criminal courts could arbitrarily deny trial by jury and if first opportunity to correct wrong lies in an appeal after a conviction, irreparable damage may be done to citizens.

4. Jury 🔑31(1)

Any court which denies the right of a trial by jury in a case where any party has the constitutional right to such trial exceeds its jurisdiction.

5. Prohibition 🔑10(2)

Where petitioner was being tried as an alleged incompetent, she had a constitutional right to a jury trial on issue of incompetency, and failure of trial court to so allow jury trial exceeded its jurisdiction, and made it subject to writ of prohibition arresting its proceedings. Code Civ.Proc. § 1102.

◆

Milton M. Cohen, Milton M. Cohen, Jr., Los Angeles, for petitioner.

Chase, Rotchford, Downen & Chase, Los Angeles, for respondent real party in interest.

Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent Court.

PER CURIAM.

In this case the Superior Court is proceeding to try without a jury the issue of incompetency of a citizen of this state. Demand for a jury was made in due and proper time and was by the court denied. Upon this showing an alternative writ of prohibition issued, time for hearing shortended, and the matter heard this day.

[1] Two grounds to the opposition of the issuance of the writ are urged: "First, that as a matter of law the Superior Court is right and that the alleged incompetent has no right to trial by jury of that issue. Without reviewing the authorities, this court is definitely of the opinion that the trial court was in error in this respect. Secondly, it is urged that the writ of prohibition does not lie in any event because the alleged incompetent has a plain, speedy, and adequate remedy at law. This view of the limitation of the writ of prohibition was first expressed in Powelson v. Lockwood, 82 Cal. 613, 23 P. 143. In that case it was held that a justice of the peace who denied petitioner a jury trial had not exceeded his *jurisdiction.* Therefore, if error was committed, it could be corrected on appeal rather than by invoking prohibition. This proposition has been approved in a number of early decisions of the Supreme Court and of the District Courts of Appeal. Powelson v. Lockwood, supra; Beaulieu Vineyard v. Superior Court, 6 Cal. App. 242, 248, 91 P. 1015; Hamberger v. Police Court, 12 Cal.App. 153, 106 P. 894, 107 P. 614; Dickerson v. Superior Court, 41 Cal.App. 534, 183 P. 235; Havemeyer v. Superior Court, 84 Cal. 327, 398, 24 P. 121, 10 L.R.A. 627, 18 Am.St.Rep. 192.

[2] We are impressed, however, that later cases have relaxed this rigorous rule as well as definition of jurisdiction, and have committed the question of issuance of the writ here sought to the sound discretion of the court to which application therefor is made, in the light of whether by reason of the nature of the proceeding and the facts and circumstances shown, an appeal would be a speedy and adequate remedy.

[3, 4] In view of the constitutional right of every citizen to a trial by jury in a proper case, the rule should be re-examined. Otherwise, the trial courts in

criminal cases could arbitrarily deny trial by jury and if the first opportunity to correct the wrong lies in an appeal after a conviction, irreparable damage may be done to citizens. Section 1102 of the Code of Civil Procedure provides that the writ of prohibition is a counterpart of the writ of mandate and arrests proceedings of any tribunal in excess of its jurisdiction. It is our view that any court which denies the right of trial by jury in a case where any party has the constitutional right to it exceed its jurisdiction. This view receives support in the dissenting opinion of Chief Justice Beatty in Hamberger v. Police Court, supra.

[5] It is therefore ordered that the demurrer be overruled and that a peremptory writ of prohibition issue as prayed prohibiting the trial court from proceeding with trial other than by trial with a jury.

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95 Cal.App.2d 352

In re LUNDELL'S ESTATE.

Civ. 17121.

District Court of Appeal, Second District, Division 1, California.

Jan. 26, 1950.

Hearing Denied Feb. 23, 1950.

On petition for rehearing on appeal from an order of the Superior Court of Los Angeles County, Harold Jeffery, J.

The District Court of Appeal, Per Curiam, held that in ordinary civil actions unqualified reversal of judgment has the effect of remanding cause either for a new trial or for other appropriate proceedings.

Petition for rehearing denied.

For original opinion, see 212 P.2d 914.

Appeal and error 🔑1180(1)

In ordinary civil actions an unqualified reversal of judgment by appellate tribunal without directions to trial court has the effect of remanding the cause either for a new trial or for other appropriate proceedings.

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Sprague & Sparks, Los Angeles, for appellants.

Prentiss Moore, Charles M. Hughes and George L. Duke, Los Angeles, for respondents.

PER CURIAM.

The petition for rehearing of respondents herein raises the question as to the status of their position by reason of this court's reversal of the order appealed from without directions to the trial court.

The rule appears to be well established that in ordinary civil actions an unqualified reversal of the judgment by an appellate tribunal has the effect of remanding the cause, either for a new trial or for other appropriate proceedings. Rinaldo v. Superior Court, 15 Cal.App.2d 585, 588, 59 P.2d 868, and authorities there cited. See, also, De Hart v. Allen, 26 Cal.2d 829, 833, 161 P.2d 453; In re Estate of Wear, 20 Cal.2d 124, 128, 124 P.2d 12.

The petition for rehearing is denied.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

STOCK v. MEEK et al.

Civ. 16928.

District Court of Appeal, Second District, Division 1, California.

Jan. 31, 1950.

Rehearing Denied Feb. 17, 1950.
Hearing Granted March 30, 1950.*

Edna Harriet Stock brought action against Glenn L. Meek and Prudence J. Meek to recover amount paid by plaintiff for apartment unit in hotel and to rescind sale, on ground of alleged misrepresentations. Glenn L. Meek brought a counterclaim against the plaintiff to recover usurious interest which he had paid the plaintiff on a note.

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* Subsequent opinion 221 P.2d 15.

The Superior Court of Los Angeles County, Thomas J. Cunningham, J., rendered a judgment for the defendants and order denying motion of plaintiff for a new trial, and the plaintiff appealed.

The District Court of Appeal, Drapeau, J., held that the exclusion of testimony as to alleged misrepresentations was reversible error, and that Glenn L. Meek was not entitled to recover usurious interest.

Judgment reversed and appeal from order dismissed.

1. Appeal and error 🔑153, 1210(1)

Where vendor induced purchaser to purchase apartment unit in hotel for $9,000 by alleged misrepresentations, but purchaser later discovered alleged misrepresentations, and sued to recover $9,000, and vendor counterclaimed for $10,000 overpaid purchaser on a usurious note, and recovered judgment for $10,000, and caused execution to be levied on apartment unit, and unit was sold on execution, and judgment for vendor was reversed, purchaser was not prevented from having a retrial of her cause of action, on ground that purchaser could not restore consideration because divested of ownership, nor was purchaser estopped to carry on appeal.

2. Vendor and purchaser 🔑341(3)

In action by purchaser against vendor of apartment unit in hotel to recover amount paid, on ground of alleged misrepresentations of vendor, evidence as to alleged misrepresentations, was competent to issues of rescission and money had and received and was also competent to prove alleged fraud, mistake, and failure of consideration.

3. Appeal and error 🔑1056(1)

The sustaining of objections to admissible testimony which would have tended to establish right of plaintiff to recover, was reversible error.

4. Usury 🔑142(2)

A suit to recover treble damages provided by the Usury Act, must be begun within one year after payment of usurious interest. Gen.Laws, Act 3757; Const. art. 20, § 22.

5. Usury 🔑101

Where debtor has not brought action for recovery of penalty for usurious interest payments within statutory period, he has at most merely a naked right of a setoff of items against principal debt, if any. Gen.Laws, Act 3757; Const. art. 20, § 22.

6. Usury 🔑102(1), 104

A debtor for whose benefit the Usury Act is made, may waive the usury, and, if he pays the interest, he cannot recover it. Gen.Laws, Act 3757; Const. art. 20, § 22.

7. Usury 🔑101

Where maker of note for payment of $20,000 one year after loan of $10,000 did not file counterclaim against lender to recover the $10,000 overpaid on the note until more than one year after note had been paid in full, no recovery could be had under the Usury Act. Gen.Laws, Act 3757; Const. art. 20, § 22

8. Usury 🔑102(1)

Under the Usury Act, the parties cannot be regarded as in pari delicto so as to prevent recovery. Gen.Laws, Act 3757; Const. art. 20, § 22.

9. Contracts 🔑138(1)

Where an illegal contract is entered into voluntarily, and turpitude of the parties is mutual, they will be left by the courts where they find themselves, since equity will not aid one party or another to an illegal transaction when they stand in pari delicto.

Desmond & Desmond, Long Beach, for appellant.

Newton M. Todd, Fred A. Watkins, Long Beach, and James J. Baker, San Marino, for respondents.

DRAPEAU, Justice.

In the early months of 1945 Mr. Glenn L. Meek, the defendant in this action, purchased the Palace Apartment Hotel in Long Beach, California. There were forty-six apartment units in the hotel. It was the purpose of the defendant to sell apartments to individuals on an "own-your-own" plan.

Legal counsel was employed to petition the Corporation Commissioner for a permit to sell units to the public. An escrow and trust were set up, to convey title to purchasers of units, to pay expenses of the transaction, and finally, to distribute such profits as might result.

The defendant was advised that to obtain the permit, a second mortgage on the property would have to be paid. To raise money to do this he conveyed 15% interests in the profits to two of his friends, each of whom put $5,000 into the venture. But the defendant still had to have $10,000 more.

One of his friends suggested that the plaintiff, Edna Harriet Stock, might be induced to furnish this necessary $10,000. Defendant went to her and proposed that she loan him $10,000, for which he would give her his promissory note for $20,000, payable 365 days from date, without interest. Plaintiff said she would like to talk with an attorney about the proposition. So, she and defendant together consulted defendant's attorney. The attorney advised them that making a loan of $10,000 and taking a note for $20,000 was usury.

Nevertheless defendant and plaintiff went on with it; she loaned the money, and he made the note. The note was put into the trust, to be paid before the profits were distributed. In due time all of the apartments were sold, and all expenses paid, including $20,000 to the plaintiff. To evidence this payment she signed a memorandum "paid in full" written across the face of the note.

The same parties had another business transaction. The plaintiff purchased from the defendant Space 101 in the same apartment house, for $9,000. Neither the pleadings nor the evidence are particularly clear as to what this "space" consisted of. Apparently the plaintiff believed that the space could be closed off to the public, and apparently she later found that this could not be done, and it was therefore useless to her. She alleged in her complaint that the defendant represented to her that Space 101 could be closed off so that she would have exclusive use of it, and that she later discovered that this could not be done because of building and fire regulations of the city of Long Beach. Her attempts to prove these allegations at the trial were thwarted by the exclusion of all evidence relative thereto.

In any event, concluding that the space was not as it had been represented to her, and that it was useless to her, plaintiff rescinded the contract of purchase, and sued for recovery of $9,000. Also in her complaint was a common count for $9,000, for money had and received by defendant for her use and benefit.

Defendant answered, denying the allegations of the complaint, and counterclaimed for $10,000 overpaid on the note.

The issues were tried by the court without a jury, with the following result: Judgment (a) against the plaintiff for the recovery of $9,000 (leaving her with the apartment space); and (b) for the defendant and against the plaintiff for $10,000 on the counterclaim. From this judgment plaintiff appeals.

Two principal grounds for reversal are presented:

It was error for the trial court to sustain objections to evidence of conversations between the parties prior to plaintiff's purchase of the apartment house space, thus denying to plaintiff any opportunity to prove her cause of action for rescission, or on the common count, and

It was error to render judgment for $10,000 for the defendant, because the parties were *in pari delicto* in violating the usury laws of this state.

At the threshold of the case, defendant contends that the appeal must be dismissed because all of the questions have become moot. This contention is based upon the following facts appearing by affidavit: No bond for stay of execution of the judgment for $10,000 was filed. Defendant caused execution to be levied on property of plaintiff, including the aforesaid Space 101, and Apartment 702 in the apartment building. The two latter properties were sold on execution, and $3,000 paid to plaintiff for her homestead rights in Apartment 702. The defendant judgment creditor purchased Space 101 for $3,000.

After the execution sale, maintenance charges required for said Space 101 became delinquent, and the apartment house trustee sold it to the defendant judgment creditor for $1,000. Defendant later sold Space 101 to third parties, who are now owners and holders thereof.

Defendant asserts that plaintiff, being divested of ownership of Space 101, is out of court, because it is beyond her power to restore the consideration as to which she claims rescission; and, also, that having been paid $3,000 for her homestead rights in Apartment 702 she is estopped to further prosecute her appeal.

[1] However, as the case is to be retried, it can well happen that the trial court may find that the plaintiff paid to defendant $9,000 for Space 101, and received nothing in return. As was said in Philpott v. Superior Court, 1 Cal.2d 512, 36 P.2d 635, 95 A.L.R. 990: The law implies a promise to pay, to prevent the unjust enrichment of the defendant. Also the complaint alleges plaintiff's offer to restore the consideration as part of her cause of action for rescission. This is sufficient to require trial of the case, especially when it may be found that the defendant himself made it impossible for the plaintiff to restore the consideration. And there is no merit to defendant's suggestion of plaintiff's estoppel to carry on the appeal.

This, then, calls for review of the rulings of the court sustaining objections to testimony proffered by the plaintiff in support of her causes of action for rescission of the contract, and for recovery under her common count. Counsel for plaintiff made an offer of proof as follows:

"Mr. Braswell: Since objections were made to the introduction of certain evidence and conversations, at this time I desire to state to the Court and offer, and we are able to offer the following evidence: A conversation took place in August, 1945 in which conversation the defendants Meeks stated and represented to the plaintiff in this action, Mrs. Stock, that that part of Space 101 described as B in Exhibit 1 could be closed off and locked and that that part, the doorway at A, in Plaintiff's Exhibit 1, could be closed off and locked, and all space in 101 could be private and no one could enter. In October, 1945, we also are able to introduce a conversation between plaintiff and defendant Meeks, a similar statement, and assurance, and on November 7, 1945, a similar conversation took place and likewise in November, 1945 a similar conversation took place and thereafter various conversations took place between the plaintiff and the Meeks to the effect that the space I have referred to could be cut off, the door placed thereon, and Space 101 will be entirely a private property and no one else will be permitted to enter. * * *

* * * * * *

"* * * that the plaintiff had confidence and trusted in the defendant, in making those statements and otherwise she would not have purchased the property and after she purchased or determined, and was advised by the Fire Department, and it was pointed out to her that she could not do so, because of the fire restrictions * * *"

[2] The evidence offered was competent and material to the issues of rescission and money had and received, and should have been received and considered by the trial court.

Sec. 1689 of the Civil Code provides that a contract may be rescinded if the consent of the party rescinding was given by mistake, or through the fault of the party as to whom the rescission is urged, or if the consideration becomes entirely void from any cause, or fails in a material respect. In an action in rescission it is no defense that misrepresentations complained of are oral and are not included in the contract itself. If this were so it would not be possible to avoid a written contract for misrepresentations inducing it. Mooney v. Cyriacks, 185 Cal. 70, 195 P. 922; Bechtold v. Coney, 42 Cal.App. 563, 183 P. 841; Peterson v. Wood, 119 Cal.App. 731, 7 P.2d 359; United Inv. Co. v. Los Angeles Interurban R. Co., 10 Cal.App. 175, 101 P. 543.

In addition to fraud, the evidence offered was competent to prove mistake and failure of consideration.

[3] It is error to sustain objections to testimony which would tend to establish

plaintiff's right to recover. Morrison v. Mutual Life Ins. of N. Y., 15 Cal.2d 579, 103 P.2d 963.

With reference to the judgment for the defendant for $10,000: In the recent case of Carter v. Seaboard Finance Co., 33 Cal. 2d 564, 203 P.2d 758, is to be found a comprehensive and authoritative history of usury, and of the development of California law relative thereto. In 1934 the people of this state adopted a Constitutional Amendment, Art. XX, Sec. 22, which fixed the maximum permissible interest rate for money loaned at 10%. This restriction does not apply to certain financial institutions named in the amendment, as to which maximum rates of interest may be fixed by the Legislature. However, the parties to this action do not come within the exceptions.

Act 3757, Deering's General Laws, provides that the person who pays any greater interest than that permitted by law may recover treble damages, *provided such action shall be brought within one year after such payment.* (Emphasis added.) The note here under consideration is dated February 1, 1945, and is endorsed "paid in full Jany. 12, 1946." The complaint was filed March 26, 1947.

[4, 5] In view of the lapse of time, it is difficult to see upon what legal theory judgment was rendered against the plaintiff for $10,000. A suit for the penalty provided by the usury act must be begun within one year after the payment of the usurious interest. Ames v. Occidental Life Ins. Co., 210 Cal. 271, 291 P. 182. At most the defendant in this case had the naked right of a set off of the item against a principal debt, if any. Ames v. Occidental Life Ins. Co., supra.

[6, 7] A debtor for whose benefit the law is made may waive usury, and if he pays the interest he cannot recover it. Matthews v. Ormerd, 140 Cal. 578, 74 P. 136, and see note in L.R.A.1918B, at page 589.

[8] Having come to this conclusion, it is unnecessary to decide whether defendant may or may not recover, applying the rule of *in pari delicto.* Under the usury law of California, the parties to a usurious transaction are not regarded as in pari delicto. Westman v. Dye, 214 Cal. 28, 4 P.2d 134. But under the facts in this case it is doubtful if the defendant would be permitted to use the statute as an engine to perpetrate an injustice. Van Noy v. Goldberg, 98 Cal. App. 604, 277 P. 538.

Both parties agreed to violate the usury law. The defendant was a businessman and should have known what usury was. He was advised by his own attorney that this particular transaction was usury. He proposed it; it was consummated under his direction and supervision; he made no objection to the payment of the note in the escrow which he himself set up; and he urged usury, as a defense for the first time in litigation with the plaintiff over another matter.

[9] Generally, where an illegal contract is entered into voluntarily and the turpitude of the parties is mutual, they will be left by the courts where they find themselves. Equity will not aid one party or another to an illegal transaction when they stand *in pari delicto.* Colby v. Title Ins. and Trust Co., 160 Cal. 632, 117 P. 913, 35 L.R.A.,N.S., 813, Ann.Cas.1913A, 515.

In Babu v. Petersen, 4 Cal.2d 276, 48 P. 2d 689, the parties conspired to violate the alien land laws of this state, and were *in pari delicto.* In such circumstances the law left them where it found them.

In New Jersey it has been held that where all of the parties to a usurious contract were *in pari delicto* none could recover. Ryan v. Motor Credit Co., 130 N.J. Eq. 531, 23 A.2d 607.

In construing the California Corporate Securities Act, Gen.Laws, Act 3814, our courts have held that while the buyer of corporate securities generally is not *in pari delicto* with the seller, Tatterson v. Kehrlein, 88 Cal.App. 34, 263 P. 285; Miller v. California Roofing Co., 55 Cal.App.2d 136, 130 P.2d 740, nevertheless, in proper cases, the doctrine is applicable. Miller v. California Roofing Co., supra; Campbell v. Julian Merger Mines, 111 Cal.App. 649, 295 P. 1040; Domenigoni v. Imperial Live Stock & Mortgage Co., 189 Cal. 467, 209 P. 36.

The judgment is reversed and the appeal from the order denying motion for new trial is dismissed.

WHITE, P. J., and DORAN, J., concur.

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95 Cal.App.2d 845

BUNCH v. EASON et al.

Civ. 4111.

District Court of Appeal, Fourth District, California.

Feb. 2, 1950.

Rehearing Denied Feb. 28, 1950.

Hearing Denied April 3, 1950.

Forest H. Bunch sued Andrew J. Eason, and others, for personal injuries received in an automobile collision.

The Superior Court for San Bernardino County, Russell Goodwin, J., rendered a judgment for plaintiff, and the named defendant appealed.

The District Court of Appeal, Mussell, J., held that whether the named defendant's negligence was a proximate cause of plaintiff's injuries, and whether plaintiff was contributorily negligent so as to bar his recovery were questions for the jury.

Judgment affirmed.

1. Automobiles 🔑245(55)

Whether negligence of a driver who suddenly turned left on a three-lane highway in front of a passing automobile and collided therewith was a proximate cause of injuries received by a passenger in the passing automobile who was injured three minutes later while working on disabled vehicles when a third automobile operated by an intoxicated driver struck passenger was a question for the jury.

2. Negligence 🔑136(25)

Generally, question whether an intervening act of negligence breaks the chain of causation so as to make the original negligence a remote cause rather than a proximate cause of an injury is always a question of fact to be decided by the jury.

3. Negligence 🔑61(2)

Where original negligence continues and exists up to time of injury, a concurrent negligent act of a third person causing the injury will not be regarded as an independent act of negligence; but the two concurring acts of negligence will be held to be the proximate cause of the injury.

4. Automobiles 🔑245(75)

In action by passenger of first automobile against driver of second which suddenly turned left on three lane highway in front of first while it was passing, whether passenger of first automobile was contributorily negligent in attempting to separate vehicles after collision so as to bar recovery for injuries received when struck by a third automobile at night three minutes later was a question for the jury.

5. Negligence 🔑105

In California, doctrine of assumption of risk is merely one phase of doctrine of contributory negligence.

Parker, Stanbury & Reese, Los Angeles, Richard E. Reese, Los Angeles, for appellant.

Novack & Haberkorn, San Bernardino, Francis J. Gabel, Los Angeles, Henry F. Walker, Los Angeles, of counsel, for respondent.

MUSSELL, Justice.

This is an action brought by the plaintiff to recover damages for personal injuries received by him in an accident which occurred on Colton Avenue, a 56 foot wide, paved, three-lane highway, running between the cities of San Bernardino and Colton. The center of the highway, or passing lane, was 16 feet wide and the other two lanes were each 20 feet wide, and although the highway runs somewhat diagonally, insofar as compass directions are concerned, it was considered during the trial that it ran north and south; north being toward San Bernardino and south toward Colton. Near the scene of the accident and on the east side of Colton Avenue was a cafe, known as "Maxine's" and the highway at this point was bounded by concrete curbings, containing two openings on the east side for driveways to the cafe. The highway was wet and apparently it had just stopped raining.

Defendant Eason, accompanied by some friends, was driving south on Colton Avenue approaching "Maxine's" Cafe, which was on his left or opposite side of the highway. He was traveling in the outer or west lane of Colton Avenue. To his rear and traveling south in the same lane was a Plymouth coupe occupied by Frank Draper, as driver, and plaintiff, Forest H. Bunch, as passenger. The Plymouth was owned by plaintiff Bunch. Upon approaching defendant Eason's vehicle, Draper pulled over to the center or passing lane preparatory to passing the Eason car and gave a "little honk" as a warning. Suddenly, without any signal or other indication of his intention to do so, defendant Eason turned left from the west lane on Colton Avenue toward the driveway of the cafe. Draper, in an attempt to avoid contact with the Eason car, turned to the left and the rear bumper of the Eason vehicle caught and hooked the front bumper of plaintiff's Plymouth, dragging the latter on across to the east side of Colton Avenue. Defendant Eason's car came to a stop with its front wheels just on or over the east curb line of Colton Avenue and approximately at right angles to the curb line with the caught and hooked Plymouth directly behind it.

All of the parties alighted from the two cars and entered the cafe with the exception of Draper and Eason, who proceeded to discuss the accident, and plaintiff Bunch, who went up to the front end of his Plymouth and noticed that the front grill was damaged. Bunch saw Draper and Eason on the other side of the hooked cars and heard them talking, but did not hear what was said. He saw a fuse type flare which had been placed in the east lane of Colton Avenue, about 150 to 200 feet south of where the two vehicles had stopped and he then attempted to pry the bumpers of the two cars apart. He was so engaged for about a minute, when he found it was too heavy to do alone. He called to Draper to help, and then Draper yelled "look out". Plaintiff looked up and back and immediately was struck by a north bound car operated by defendant Olson, who was intoxicated at the time. Plaintiff was struck by the Olson car about 3 minutes after the defendant Eason first had turned his car to the left in front of the Plymouth. Plaintiff received severe injuries and the instant action was brought against defendant Olson and defendant Eason to recover damages therefor. A jury trial resulted in a verdict against both defendants. Eason alone has appealed from the ensuing judgment.

On this appeal Eason concedes that the evidence is ample to support a finding of negligence on his part as a result of which plaintiff's Plymouth was immobilized in the described position on Colton Avenue and concedes that the jury was properly and correctly instructed as to the law. He contends that Eason's negligence was a remote and not a proximate cause but that defendant Olson's negligence operated as an independent intervening cause breaking the chain of causation; that plaintiff "assumed the risk" of any injury by attempting to disengage the bumpers of the two vehicles while in the east lane of Colton Avenue, and that plaintiff was guilty of contributory negligence. It is conceded that the court properly instructed the jury on the law relative to proximate cause and efficient intervening cause.

[1, 2] We conclude that the question whether Eason's negligence was a proximate cause of plaintiff's injuries and damages herein was, under the circumstances here shown, a question of fact for the jury and as the jury determined this question against the defendant Eason, its determination is binding upon us. Fennessey v. Pacific Gas & Electric Co., 20 Cal.2d 141, 145, 124 P.2d 51; Brunetto v. Spediacci, 124 Cal.App. 252, 256, 12 P.2d 151; Sipperly v. San Diego Yellow Cabs, Inc., 89 Cal.App.2d 645, 201 P.2d 543; McEvoy v. American Pool Corp., 32 Cal.2d 295, 299, 195 P.2d 783. And Stockwell v. Board of

Trustees, 64 Cal.App.2d 197, 204, 205, 148 P.2d 405, 409, where the court said:

"Then again, as to the question of proximate cause, where it is claimed that an intervening cause has broken the chain of causation, it has been repeatedly held that such a question is one of fact for the jury. The general rule is stated in Springer v. Sodestrom, 54 Cal.App.2d 704, 129 P.2d 499, 502, as follows: '* * * the question whether or not an intervening act of negligence breaks the chain of causation so as to make the original negligence a remote cause rather than a proximate cause of an injury, is always a question of fact to be decided by the jury. (Citing numerous authorities).' * * *"

[3] The evidence is that plaintiff received the injuries complained of within approximately 3 minutes after the Eason car turned across the highway in front of his automobile and during that time it cannot be said as a matter of law that plaintiff was required to abandon his car when it was obstructing the highway. The jury was entitled to infer that Eason's negligence placed the plaintiff Bunch in a position of danger upon the highway and that plaintiff acted as a reasonable and prud person would act in attempting to disengage his automobile from the Eason car and that the original negligence of Eason continued to exist up to the time of plaintiff's injuries. As was said in Lacy v. Pacific Gas & Electric Co., 220 Cal. 97, 98, 29 P.2d 781, 782:

"The authorities in this state hold that where the original negligence continues and exists up to the time of the injury, the concurrent negligent act of a third person causing the injury will not be regarded as an independent act of negligence, but the two concurring acts of negligence will be held to be the proximate cause of the injury."

And 220 Cal. on page 101, 29 P.2d on page 783:

"When, as here, it is claimed that an injury was caused both by the continuing negligent act of one defendant and the independent concurring negligent act of a third person, many facts are to be considered in determining the proximate cause. 45 C.J. 897–925. The proof on that element includes all 'the attending circumstances.' 45 C.J. 914; Royal Indemnity Co. v. Public Ser. Corp., supra, 42 Cal.App. 628, 183 P. 960; Marton v. Jones, 44 Cal.App. 299, 186 P. 410. In the instant case much evidence regarding attending circumstances was introduced. The question was submitted under full and specific instructions. If the jury believed the evidence so introduced by the plaintiff, and from its verdict we must assume it did, this court may not say as a matter of law that the issue of proximate cause was not proved."

[4, 5] The defendant contends that the plaintiff must be held guilty of contributory negligence as a matter of law and barred from recovery under the "doctrine of assumption of risk". Plaintiff at the time he was injured was in a position in which he had been placed as a proximate result of defendant Eason's negligence. Whether his actions were those of a reasonable, prudent person in the same or similar circumstances, was a question of fact for determination by the jury, Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183; Dennis v. Gonzales, 91 Cal.App.2d 203, 205 P.2d 55, and we cannot say as a matter of law that he was guilty of contributory negligence when there was substantial evidence to support the conclusion reached by the jury. Crawford v. Southern Pac. Co., supra. As was said in Potts v. Crafts, 5 Cal.App.2d 83, 85, 42 P.2d 87, or as held in Lee v. Dawson, 44 Cal.App.2d 362, 370, 112 P.2d 683, 688:

"The so-called doctrine of assumption of risk is merely one phase of the doctrine of contributory negligence."

The taking of reasonable risk by the plaintiff herein to save his property can be said to have been thrust upon him by the defendant Eason's negligence and it was for the jury to say whether the plaintiff acted with prudence under the circumstances or conducted himself in so reckless a manner as to defeat the right of recovery. Henshaw v. Belyea, 220 Cal. 458, 463, 31 P.2d 348.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

PEOPLE v. ZERILLO.

Cr. 2580.

District Court of Appeal, First District, Division 2, California.

Jan. 30, 1950.

Hearing Granted Feb. 27, 1950.*

Lorenzo Zerillo was convicted of the crime of bribery in the Superior Court in and for the City and County of San Francisco, Daniel R. Shoemaker, J., and the defendant appealed.

The District Court of Appeal, Dooling, J., held that instruction on what constituted criminal intent was prejudicial error and exclusion of testimony of priest that on day alleged bribe was offered to state food inspection officer, defendant telephoned to priest and asked him to go with defendant to see officer to persuade him to release cases of quarantined food so that he could sell them and give all or part of money for building of church was prejudicial error and extending cross-examination to matters not covered by defendant in direct examination was prejudicial error.

Judgment and order denying new trial reversed and defendant remanded for new trial.

1. Criminal law ⇨342

In prosecution for bribery, admission of large number of written reports of chemist's examination of quarantined tomato products of defendant's cannery showing products were above tolerance or too high for sale, and letters of defendant to customers of cannery referring to products and suggesting their immediate disposal was proper to show motive for defendant's alleged attempt to bribe food inspector.

2. Criminal law ⇨371(12)

Evidence of other offenses may be given to show a motive for commission of crime charged unless motive of defendant is obvious and real purpose of evidence is to prejudice defendant in minds of jury.

3. Criminal law ⇨663

In prosecution of defendant cannery president for offering to give bribe to food inspector for release of quarantined food products, where chemist at defendant's cannery testified that a copy of all reports as to quarantined products was either delivered to defendant personally, given to his secretary or placed on defendant's desk, sufficient foundation was laid for introduction of reports.

4. Bribery ⇨13

In prosecution of defendant cannery president for offering to give bribe to food inspector for release of quarantined food products, evidence of course of conduct coupled with written evidence showing defendant's actual knowledge of reports on quarantined food, was sufficient to take to jury question whether reports had come to defendant's knowledge.

5. Criminal law ⇨1170½(1)

In prosecution of cannery president for offering to give bribe to food inspector for release of quarantined products, prosecution's cross-examination of its own witness as to witness' conversation with one of defendant's counsel during trial, if error, was not prejudicial error, where substance of conversation was not developed.

6. Criminal law ⇨349

In prosecution of defendant cannery president for offering to give bribe to food inspector for release of quarantined products, refusal to admit evidence for defense that subsequent to date of alleged bribe many of batches referred to in chemist's reports had been re-examined and found fit for human consumption was not error since state of defendant's mind at date of alleged bribe was not affected by facts developed after that time.

7. Criminal law ⇨772(5), 1172(1)

In prosecution of cannery president for offering to give bribe to food inspector for release of quarantined food products, instruction that to constitute criminal intent it is merely necessary that a person intend to do an act which, if committed, will constitute a crime and when a person intentionally does that which law declares to be a crime, such person is acting with criminal intent even though he may not know that such act is unlawful and even though there be no bad motive, was confusing and misleading and prejudicial error.

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* Subsequent opinion 223 P.2d 223.

8. Criminal law 🔑789(3), 1172(2), 1173(2)

In prosecution for bribery, defendant was entitled to a clear instruction that the intent to influence an officer in his official conduct was an element of crime which must be proved beyond a reasonable doubt in order to find defendant guilty, and failure to give such instruction and giving of misleading instruction was prejudicial error.

9. Bribery 🔑10

In prosecution of cannery president for offering to give bribe to food inspector for release of quarantined products, exclusion of priest's testimony offered by defendant to prove that day bribe was allegedly offered, defendant telephoned priest and asked him to go with defendant to see food inspector to try to persuade him to release quarantined goods so that defendant could sell them and give all or part of money to building of priest's church, was error since defendant's specific intent was an issue.

10. Criminal law 🔑412(1)

Where the intent with which the act is done is in issue declarations of person as to his intention when not too remote and when made under circumstances justifying conclusion that statements were not fabricated are admissible.

11. Criminal law 🔑1170½(5)
Witnesses 🔑269(2)

Where in bribery prosecution defendant on direct examination limited himself strictly to giving his version of interview with food inspector and a denial of offer of bribe, cross-examination of defendant at length about his knowledge of chemist's reports on quarantined food products and letters written by defendant to customers was prejudicial error. Pen.Code, § 1323.

12. Witnesses 🔑301

Where a defendant limits his testimony in chief, defendant's right not to be compelled to be a witness against himself should be respected on cross-examination by confining examination to matters reasonably germane to testimony given by defendant on direct.

13. Witnesses 🔑269(2)

Where in prosecution of defendant cannery president for offering to give bribe to food inspector, defendant testified on direct examination that his intention in going to see inspector was to try to persuade him to release cases of quarantined food so that he could sell them and give all or part of money for building of a church, cross-examination of defendant as to whether he had asked a certain priest to see if another ecclesiastic would not intercede with food inspector on his behalf was sufficiently germane to credibility of defendant's testimony on direct to justify cross-examination on subject.

14. Criminal law 🔑814(17)

In bribery prosecution, where state food inspector testified that defendant cannery president offered him a bribe to release quarantined food products, refusal to give defendant's proposed instruction on circumstantial evidence that in order to find a defendant guilty on circumstantial evidence all such facts and circumstances must be inconsistent with any reasonable theory of innocence was not error.

15. Criminal law 🔑814(17)

A court is not required to instruct on rules of law applicable to circumstantial evidence which is incidental to and corroborative of direct evidence.

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Harold C. Faulkner, A. J. Zirpoli, Melvin, Faulkner, Sheehan & Wiseman, San Francisco, for appellant.

Fred N. Howser, Attorney General, David K. Lener, Deputy Attorney General, for respondent.

DOOLING, Justice.

Defendant was convicted of the crime of bribery as proscribed by section 67 of the

Penal Code. The case was tried on a second amended information which charged in the language of the code the giving and offering to give a bribe in the amount of $5,000 to Milton P. Duffy, an executive officer of the State of California, towit: Chief of the Bureau of Food and Drug Inspections, with the intent to corruptly influence said officer in respect to his act, decision, vote and opinion as such officer.

A motion to set aside the second amended information on the ground that defendant was committed without reasonable or probable cause was denied. This was not error. Before the committing magistrate Milton P. Duffy testified that defendant, who is president of a cannery, in Duffy's office stated to Duffy that he would like to give him a little present. "Father somebody—I did not get the name * * * is building a church * * *. If you will let me have that tomato paste I can put it in a place where I can sell it." That the reference was to 1861 cases of canned tomato paste in defendant's cannery which were under quarantine by Duffy's department and that defendant produced a packet wrapped in paper and stated that it was a little present for Duffy and that the packet when opened disclosed paper money which defendant stated amounted to $5,000. While Duffy testified that defendant used the word "present" in reference to this money the proof was ample to support the second amended information.

On the trial Duffy gave similar testimony as to the occurrence in his office. It developed that defendant was building a church for a Father Duffy and the witness, Milton P. Duffy, testified that when defendant spoke of Father Duffy in connection with the building of this church the witness misunderstood him and believed that he was referring to the witness in using the name Duffy.

Duffy further testified that after the packet of money was produced and opened he became very angry, called an assistant named Wheeler from an adjoining office and accused defendant before Wheeler of offering him a bribe. Both Duffy and Wheeler testified that defendant insisted and reiterated that Duffy had misunderstood defendant, that defendant wanted to give Duffy the money for him to give to charity. Duffy testified that when he went to call Wheeler the packet of money was lying on his desk. When he returned it was not there and no money was produced on the trial.

Over objection the people introduced through one Lo Coco, a chemist employed by defendant's cannery, a large number of written reports of Lo Coco's examination of samples from many batches of canned tomato products showing that they were either "above tolerance" or "too high". Lo Coco testified that "above tolerance" meant that the worm and insect content or mold content was above that permitted in tomato products to be sold for human consumption, and "to high" meant that while his examination showed the product within the allowable tolerance it was so close thereto that the products should not be sold without a re-examination. The batches were all referred to by number and the people also introduced over objection several letters of defendant to customers of the cannery referring to some of the batches by number which Lo Coco had reported above tolerance and suggesting that the customers dispose of those batches immediately.

[1,2] The theory of the prosecution was that the knowledge of defendant that there were so many cases of questionable products in his cannery furnished a motive for the attempt to bribe Duffy to release the 1861 cases under quarantine, with the purpose that once Duffy had accepted a bribe he would be less likely to prohibit the sale of the other questionable products. We are statisfied that the court properly admitted the evidence for this purpose. The rule is thus stated in 8 Cal.Jur., Criminal Law, sec. 172, pp. 68–69: "Evidence of other offenses may be given to show a motive for the commission of the crime charged, unless the motive of the defendant is obvious and the real purpose of the evidence is to prejudice the defendant in the minds of the jury. Stated another way, whenever the question of motive, or purpose, or reason for an act is involved, testimony showing such motive, reason or purpose is admissible even though

it may establish the commission of other offenses."

The quoted language is documented by a copious citation of cases in the footnotes and later cases are cited in the notes on pp. 641–642 of 4 Cal.Jur. 10 Yr.Supp., 1943 Revision.

[3, 4] A sufficient foundation was laid for the introduction of the Lo Coco reports. As to some of them defendant's own letters to customers above referred to indicated defendant's actual knowledge of the contents of those reports. As to all of them Lo Coco testified that if defendant was present a copy of the report was delivered by Lo Coco to defendant personally, if he was not in his office the copy was either left on defendant's desk or delivered to his secretary, although Lo Coco could not remember as to any particular report that he had personally delivered that particular report to defendant.

The evidence of this course of conduct, particularly when coupled with the written evidence showing defendant's actual knowledge of some of the reports, was sufficient to take to the jury the question whether the reports had actually come to defendant's knowledge. The evidence of knowledge by defendant was largely circumstantial, but sufficient to support an inference. In this respect the case differs from People v. Blackman, 127 Cal. 248, 59 P. 573 and the other cases relied upon by defendant.

[5] Defendant complains of the prosecution's cross-examination of its own witness Lo Coco as to his talking to one of defendant's counsel during the trial. If error at all this was not prejudicial since the substance of the conversation was not developed.

[6] The court properly refused to permit evidence for the defense that subsequent to the date of the alleged bribe many of the batches referred to in the Lo Coco reports had been re-examined and found fit for human consumption. The state of defendant's mind at the date of the alleged bribe, which was sought to be proved by the Lo Coco reports, could not be affected by facts which developed after that time.

[7] Sec. 67, Penal Code, requires a specific intent. The bribe must be given or offered "with intent to influence (the officer) in respect to any act". People v. Werner, 29 Cal.App.2d 126, 131, 84 P.2d 168. The defense proposed instructions on specific intent which the court refused to give. The court instead gave the following instruction: "To constitute criminal intent it is merely necessary that a person intend to do an act, which if committed, will constitute a crime. When a person intentionally does that which the law declares to be a crime, such person is acting with criminal intent even though he may not know that such act is unlawful and even though there be no bad motive."

This instruction, particularly in the absence of any instruction on the specific intent required as an essential element of the crime, was confusing and misleading. The first sentence tells the jury nothing. Since the specific intent to influence the officer is an element of the crime the effect of the first sentence, if the jury understood it as applied to the offense charged which seems highly doubtful, could only be in this case: "To constitute criminal intent it is merely necessary that defendant intended to offer money to Duffy with intent to influence him." In other words if you find that defendant intended to bribe Duffy he intended to bribe Duffy. The jury might more probably have understood the first sentence to mean if you find that the defendant offered money to Duffy he intended to bribe him. The second sentence is worse as applied to the offense charged. By it the jury was told that "bad motive" was not necessary to criminal intent in a bribery case, although the "intent to influence" the officer (bad motive) is made a specific element of the crime.

[8] The defendant was entitled to a clear instruction that the intent to influence the officer in his official conduct was an element of the crime which must be proved beyond a reasonable doubt in order to find defendant guilty. People v. Snyder, 15 Cal.2d 706, 104 P.2d 639; People v. Neal, 40 Cal.App.2d 115, 104 P.2d 555; People v. Maciel, 71 Cal.App. 213, 234 P. 877.

That the failure to give such an instruction and the giving of the misleading instruction above quoted was prejudicial in this case sufficiently appears from the fact that immediately following the attempted bribe in the presence of Duffy and Wheeler defendant disclaimed any corrupt intent and that Duffy admitted that he was confused as to the meaning of and misunderstood a part of defendant's conversation with him at the time the alleged bribe was offered. Whether these facts would have led the jury to entertain a reasonable doubt of defendant's corrupt intent if specifically advised that such intent was an element of the crime which must be proved beyond a reasonable doubt we cannot say from a reading of the transcript.

[9, 10] Defendant testified that his intention in going to see Milton P. Duffy was to try to persuade him to release the 1861 cases of quarantined paste so that he could sell it and give all or part of the money for the building of Father Duffy's church. Father Duffy was produced to prove that on the day in question defendant telephoned to him and asked him to go with defendant to see Milton P. Duffy for that purpose. Objections to this testimony were sustained. Since defendant's specific intent was in issue this evidence should have been admitted. Where the intent with which an act is done is in issue declarations of the person as to his intention when not too remote and made under circumstances justifying the conclusion that the statement was not fabricated are admissible. People v. Silver, 16 Cal.2d 714, 724–725, 108 P.2d 4; People v. Chenault, 74 Cal.App.2d 487, 496–497, 169 P.2d 29; People v. Fong Sing, 38 Cal.App. 253, 175 P. 911.

The proffered evidence satisfies these requirements. An invitation to a priest to accompany defendant to see the officer would hardly be extended as a fabrication since the priest's acceptance of the invitation would under the circumstances defeat the purpose of the visit if that purpose was the offering of a bribe. That after Father Duffy's refusal because of illness defendant might have changed his purpose to the unlawful one alleged goes to the weight of the evidence, but does not affect its admissibility.

[11] Defendant on direct examination limited himself strictly to giving his version of the interview with Duffy and a denial of the offer of a bribe. On cross-examination, over objection, the prosecution examined defendant at length about his knowledge of the Lo Coco reports and the letters written by him to customers. It was error thus to extend the scope of the cross-examination. These matters were admissible on the people's case only to show a possible motive since the testimony of Duffy indicated clearly that if a bribe was offered it was to secure the release of the 1861 quarantined cases only.

[12] Section 1323, Penal Code, limits the right of cross-examination of a defendant in a criminal case to matters about which he was examined in chief. In People v. McCarthy, 8 Cal.App.2d 883, 886–887, 200 P.2d 69, we examined and cited many cases on the right of a defendant in a criminal case to have the cross-examination limited to the matters reasonably germane to the testimony given by the defendant on direct. Those cases stress the constitutional right of the defendant in a criminal case not to be compelled to be a witness against himself. Where a defendant carefully limits his testimony in chief this right should be respected on cross-examination. Into fields which the defendant elects to remain silent about the prosecution may not go on cross-examination unless those matters have a reasonably close relation to the matters testified to in chief or a reasonable tendency to discredit them.

[13] Defendant was also cross-examined as to whether he had not asked a certain priest to see if another ecclesiastic would not intercede with Duffy on his behalf. We think this matter was sufficiently germane to the credibility of defendant's testimony on direct to justify the cross-examination on this subject.

[14, 15] The court was not in error in refusing to give a proposed instruction on circumstantial evidence that in order to find a defendant guilty on circumstantial

evidence all such facts and circumstances must be inconsistent with any reasonable theory of innocence. The testimony of Duffy was direct evidence and while the evidence on the subject of motive was circumstantial the case falls within the rule that "a court is not required to instruct upon the rules of law applicable to circumstantial evidence which is incidental to and corroborative of direct evidence." People v. Jerman, 29 Cal.2d 189, 197, 173 P.2d 805, 809.

An examination of the record satisfies us that the errors discussed were prejudicial. Other alleged errors and misconduct are not likely to occur on another trial and need not be discussed.

The judgment and order denying a new trial are reversed and defendant remanded for a new trial.

NOURSE, P. J., and GOODELL, J., concur.

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96 Cal.App.2d 40

PEOPLE v. HOSHOR.

Cr. 4415.

District Court of Appeal, Second District, Division 3, California.

Feb. 9, 1950.

John Hoshor was convicted of violating the Corporate Securities Act.

The Superior Court for Los Angeles County, Clement D. Nye, J., made an order denying defendant's motion to vacate judgments of conviction, and defendant appealed.

The District Court of Appeal, Shinn, P. J., held that the evidence supported findings to the effect that charges of fraud, malfeasance on the part of defendant's attorney, and a conspiracy with a deputy district attorney and others were not established, and that hence vacation of the judgments was properly denied. The Court also held that the point that the only evidence received was that introduced at the preliminary hearing was not available in a proceeding to vacate the judgments.

Order affirmed.

1. Criminal law ⚷998

In proceeding to vacate judgment of conviction for violations of the Corporate Securities Act, evidence supported findings to the effect that charges of fraud, malfeasance on part of defendant's attorney, and conspiracy with a deputy district attorney and others were not established, and hence the court properly refused to vacate the judgments. Gen.Laws, Act 3814, § 2(a)7.

2. Criminal law ⚷998

Contention that judgment should have been vacated for reason that evidence at trial consisted entirely of evidence received at preliminary hearing was one that could have been urged on appeal and was not available in a proceeding to vacate judgments of conviction.

John Hoshor, in pro. per.

Fred N. Howser, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

We have before us an appeal from an order denying the motion of John Hoshor to vacate a judgment of conviction of eight offenses of violation of the Corporate Securities Act, Gen.Laws, Act 3814, under which judgments he was sentenced, on the 15th day of September, 1948, to imprisonment in a State prison.

Defendant made a motion for a new trial and appealed from the judgments. The judgments were affirmed June 7, 1949. 92 Cal.App.2d 250, 206 P.2d 882. He was represented by counsel at the trial and by new counsel upon the appeal. The questions decided on the appeal were whether certain instruments issued by defendant in connection with numerous business transactions came within the definition of "security" as used in the Corporate Securities Act, section 2(a), paragraph 7, and whether the provisions of that act under which defendant was prosecuted are constitutional.

When the case came on for trial defendant waived his right of trial by jury and stipulated to the submission of the case upon the evidence and exhibits received at the preliminary hearing. In propria persona he filed a notice of motion to vacate the judgments and sentences on July 14, 1949. He stated as grounds for the motion that he was coerced and fraudulently induced by his attorney into waiving a trial by jury and stipulating that the case be tried on the evidence produced at the preliminary hearing. Elaborating upon this ground, defendant represented by his motion and his supporting affidavit that his attorney threatened to withdraw from the case unless trial by jury was waived and the case submitted upon the aforesaid evidence; that his attorney also represented to him as follows: That the acts with which he was charged did not constitute violations of the Corporate Securities Act; that the deputy district attorney who was prosecuting the case realized that it would be thrown out by the court on legal grounds; and further, that the court had no alternative but to acquit defendant. It was asserted that the attorney's conduct was fraudulent and that his representations to defendant had corroboration in acts and omissions of the deputy district attorney. It was also asserted that the allegedly fraudulent conduct of the attorney was not discovered until after the conclusion of the trial.

The motion to vacate the judgments and sentence came on for hearing July 21, 1949. Defendant appeared without counsel. The testimony of the following witnesses was taken: Herbert Grossman, the Deputy District Attorney who prosecuted the case; William A. Larsen, the attorney who represented defendant at the trial; and defendant himself. The matter was argued at length by defendant, was submitted and the motion was denied. The court orally stated its findings to the effect that the free will and judgment of the defendant were not overcome by any false statement of defendant's attorney or any other person, that the defendant at the trial relied upon legal advice he had received from his attorney, expressed as matter of opinion only, and that defendant's charges of fraud, malfeasance upon the part of his attorney, and conspiracy with the deputy district attorney and others, were not established.

[1] All that need be said with respect to defendant's charges that he was coerced and deceived by his attorney, is that the evidence which was before the court on the hearing of the motion furnishes ample support for the factual decisions announced by the court. At no time during the entire proceedings, from the commencement of the trial to the submission of the present appeal, has the defendant asserted or even suggested that he was not a party to the instruments which were held to be securities upon defendant's appeal from the judgments. It clearly appears that his sole defense was that the issuance of the instruments in question did not constitute violations of the Corporate Securities Act. No claim has been made that this defense was not urged to the trial court, as well as to the reviewing court. The fact that defendant's attorney was mistaken as to the question of law involved is of no significance whatever in the present proceedings. It is clear from the record that defendant had the benefit of the only defense that was available to him, and there is no reason to doubt that in urging this defense at the trial defendant's attorney put forth a conscientious and competent effort. On the record before us no factual basis exists upon which the trial court would have been justified in vacating the judgments. It may be mentioned, however, that the record furnishes no support for defendant's assertion that the conduct of the prosecutor appeared to verify certain of the statements allegedly made by defendant's attorney. The incidents mentioned are trivial and of no significance whatever.

[2] The remaining point made on the appeal is that the judgment should have been vacated for the reason that the evidence at the trial consisted only of the evidence received at the preliminary hearing. The point is one that could have been urged on defendant's appeal, and is therefore not available to him in a proceeding to vacate the judgments. People v. Young, 88 Cal.App.2d 601, 199 P.2d 21, and cases

there cited; People v. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435.

The order is affirmed.

WOOD and VALLÉE, JJ., concur.

CORT v. STEEN.

Civ. 16693.

District Court of Appeal, Second District, Division 1, California.

Feb. 2, 1950.

Hearing Granted April 3, 1950.*

Action by William E. Cort, Jr., against Ralph A. Steen, as administrator of the estate of Emerald J. Steen, deceased, for injuries sustained in an automobile collision.

The Superior Court of Los Angeles County, Stanley N. Barnes, J., rendered judgment for defendant and plaintiff appealed.

The District Court of Appeal, Doran, J., held that cause of action abated by death of deceased.

Judgment affirmed.

1. Constitutional law 🔑106

Legislature had right, by 1949 amendment to Probate Code, dealing with survival of actions to change terms of Probate Code as interpreted by Supreme Court, by providing that survival provision should not apply to actions founded upon wrong resulting in physical injury or death of any person. Probate Code, § 574.

2. Statutes 🔑230

An amendment demonstrates legislative intent to change the law rather than clarify it.

3. Abatement and revival 🔑50

The 1949 amendment of Probate Code provision authorizing action against executor or administrator whose testator or intestate in his lifetime wasted, destroyed, took or converted plaintiff's property by adding that the section shall not apply to an action founded upon a wrong resulting in physical injury or death of any person is retrospective, since the Probate Code provision is merely procedural and remedial. Probate Code, § 574.

4. Abatement and revival 🔑50

Cause of action for injuries sustained in an automobile collision occurring in 1947 allegedly resulting from negligence of deceased abated on death of deceased notwithstanding decision of the Supreme Court that such cause of action survived where basis of the Supreme Court decision was removed by the 1949 amendment to the Probate Code dealing with survivorship and which being procedural operated retrospectively. Probate Code, § 574; Civ.Code, § 956.

Rodney F. Williams, Los Angeles, for appellant.

Parker, Stanbury & Reese, Richard E. Reese, Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from the judgment following the sustaining of a demurrer without leave to amend.

As recited in appellant's brief, "Plaintiff brought this action seeking to recover damages for injuries sustained in an automobile collision alleged to have been due to carelessness and negligence of Emerald J. Steen. The latter having died subsequent to the accident, the action was brought against the administrator of the estate of said Emerald J. Steen.

"The first cause of action of plaintiff's complaint alleges that as a direct and proximate result of the carelessness and negligence of Emerald J. Steen, plaintiff sustained, and will continue to suffer, severe injuries to his damage in the sum of $24,400.00. The second cause of action of plaintiff's complaint alleges that as a direct and proximate result of the carelessness and negligence of Steen, plaintiff suffered and sustained great pecuniary loss of and damage to the earnings, profits, property, property rights and estate of plaintiff which were wasted to his damage in the sum of $25,000.00, and that plaintiff will in the future suffer similar damage and loss to his earnings, profits property, property rights and estate, and that plaintiff's property, property rights and estate have been wasted and destroyed in the further sum of $600.00, which was paid out as medical, hospital and similar expense. Both causes further alleged the appointment and qualification of the administrator of Steen's estate, the filing of plaintiff's claim against the estate and the rejection thereof. A demurrer was filed by respondent on the general ground that the complaint and each cause of action thereof fails to state sufficient facts to constitute a cause of action, and on several special grounds. Said demurrer was sustained without leave to amend and judgment for defendant was entered in accordance therewith." According to appellant, the question on appeal is, "Did the causes of action alleged in plaintiff's complaint abate with the death of the negligent tort-feasor?"

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* Subsequent opinion 224 P.2d 723.

Appellant relies on Hunt v. Authier, 28 Cal.2d 288, 169 P.2d 913, 171 A.L.R. 1379, and Moffat v. Smith, Cal.App., 197 P.2d 798; also Nash v. Wright, 82 Cal.App.2d 475, 186 P.2d 691.

Respondent, on the other hand, contends that the question involved is, "Did the Legislature, by its 1949 change in the language of Section 574 of the Probate Code, destroy the basis for decision in Hunt v. Authier and pursuant decisions?" In this connection it is argued by respondent that "Hunt v. Authier, 28 Cal.2d 288 [169 P.2d 913, 171 A.L.R. 1379], decided in 1946, reversed previous concepts long prevailing in this state with respect to the survivorship of causes of action *in persona*. In that case it was held that a cause of action by the heirs of a deceased for the lessening of his estate and for deprivation of the right to future support, brought against the estate of the deceased tort feasor, was a cause of action for injury to property and survived the death of the tort feasor. The decision there was the father of Moffat v. Smith, [33 Cal.2d 905, 206 P.2d 353] and Nash v. Wright, 82 Cal. App.2d 475 [186 P.2d 691]. Moffat v. Smith appears to be on all fours with the case at bar since in that case the injured plaintiff brought the same type of action against the estate of the deceased tort feasor as in the present case.

"Hunt v. Authier was decided by a sharply divided court (four to three), and contains a thoroughly analytical dissenting opinion by Justice Spence. The entire basis for the majority opinion was a construction of Section 574 of the Probate Code, the conclusion being that the cause of action brought by the heirs was one for damage to 'property' within the meaning of the statute. This, we urge, was a strained construction and, as Justice Spence points out, amounted to judicial legislation. There was no basis for the decision other than the majority's interpretation of the statute involved; therefore if the decision is a demonstrable misinterpretation of the statute, and Hunt v. Authier and the decisions descended from it can no longer be said to be the law of this state.

"The 1949 Legislature made a significant change in Section 574 by adding the following language: 'This section shall not apply to an action founded upon a wrong resulting in physical injury or death of any person.'

"It is our position that this language was intended by the Legislature not as a change in the rights conferred by the section but as a clarification of its meaning. It it is a clarification of the meaning of Section 574, the holding in Hunt v. Authier must fall as it would otherwise rest upon an untenable hypothesis.

"It is first to be noted that under long established law it is presumed that the Legislature, in dealing with an existing statute, acted with knowledge of the pertinent judicial decisions."

It should be noted at the outset that Section 574 of the Probate Code relates to *procedure* only; it is not substantive law, a point which, apparently, was not considered in the Authier and Smith cases. Section 574 of the Probate Code authorizes "*Executors* and administrators" to bring the "action" referred to in the section, or "any person, or the personal representative of any person, may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use, the property of any such person or committed any trespass on the real property of such person."

[1-3] The opinion in the Hunt v. Authier case was filed June 7, 1946. That this opinion, as recited in respondent's brief, "reversed previous concepts long prevailing in this state with respect to the survivorship of causes of action *in persona*", there can be no question. By the court's interpretation of Section 574 of the Probate Code, which as noted above, is but a procedural and remedial provision, a new right and liability was created which theretofore had not existed. And, it is important to note that the remedy was without limitation. It established such a right of action "founded upon a wrong resulting in physical injury or death of any person", within the meaning of Section 574 of the Probate Code as that section read at that time. And the opinion in the Hunt v. Authier case so construing said section was then the law of the case. The fact that the opinion was by a divided court or that a difference of opinion may have existed as to the merit of the decision, is beside the issue; it became and was the law as to the meaning and intent of Section 574. But in 1949, Section 574 of the Probate Code was amended by the addition of a single sentence which, as noted above, reads as follows: "This section shall not apply to an action founded upon a wrong resulting in physical injury or death to any person". Thus by all of the applicable rules of construction the law as established by the opinion in the Hunt v. Authier case was "repealed", for, as conceded by appellant, "the legislature would, of course, have a right, by amendment, to change the terms of a statute as interpreted by the Supreme Court. It seems clear, therefore, that the amendment to Section 574 of the Probate Code was an enactment in accordance with the general rule that an amendment demonstrates the legislative intent to change the law rather than clarify it, Loew's, Inc., v. Byram, 11 Cal.2d 746, 750 [82 P.2d 1]." Appellant's contention therefore that the Hunt v. Authier opinion is authority for the within action, is without merit. Section 574 of the Probate Code being merely procedural and remedial, the 1949 amendment is retrospective. 16 Corpus Juris Secundum, Constitutional Law, § 414, page 856 et seq.; Moss v. Smith, 171 Cal. 777, 155 P. 90; Berg v. Traeger, 210 Cal. 323, 292 P. 495.

The appellant's opening brief and the respondent's brief is confined to a consideration of Section 574 of the Probate Code. Appellant's reply brief adds the argument that, "the legislature by Statutes 1949, chapter 1380, not only amended Section 574 of the Probate Code, but at the same time, and as a part of the same statute added a new section to the Civil Code, Section 956, which now provides as follows: 'A thing in action arising out of a wrong which results in physical injury to the person or out of a statute imposing liability for such injury shall not abate by reason of the death of the wrongdoer or any other person liable for damages for such injury, nor by reason of the death of the person injured or of any other person who owns any such thing in action. * * *'

"The only conclusion that can be drawn is that the legislature removed from the Probate Code the right of action formerly allowed by Section 574 and placed such right of action with certain changes and enlargements in its scope within the provisions of the Civil Code." And, "that the cause of action herein which respondents concede is on all fours with the case of Moffat v. Smith * * * has not fallen or ceased to exist."

[4] From an examination of the amendment to Section 574 and the provisions of Section 956 it is clearly evident that the legislature intended to eliminate entirely the remedy established by the Hunt v. Authier decision but, at the same time to establish a somewhat similar right and liability within certain limitations. Section 956 of the Civil Code which was also adopted in 1949 accomplishes this purpose. The incident upon which plaintiff's cause of action is based, however, occurred in 1947 and, in-

asmuch as the provisions of Section 956 is substantative law as distinguished from mere procedure, Section 956 is not retrospective, and therefore cannot provide a basis for plaintiff's cause of action.

For the foregoing reasons, the judgment appealed from is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

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95 Cal.App.2d 804

INDUSTRIAL INDEMNITY CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

No. 14352.

District Court of Appeal, First District, Division 1, California.

Jan. 31, 1950.

Workmen's compensation proceeding by Bill R. Baxter and Barbara Ann Baxter, a minor, by her guardian ad litem and trustee, Bill R. Baxter, against Industrial Indemnity Company and Greenville Inn.

The Industrial Accident Commission entered an order that claimant take nothing by reason of claim filed, and after rehearing an award was granted to deceased's minor child, Barbara Ann Baxter, and defendant brought writ of review against Industrial Accident Commission and claimant.

The District Court of Appeal, Bray, J., held that death of employee caused by her being accidentally shot by customer's wife, which occurred while employee was discharging duties of her employment as waitress at bar, was compensable.

Award affirmed.

1. Workmen's compensation 🔑606

Provision in compensation act creative of liability of an employer for "any injury sustained by his employees arising out of and in the course of the employment" requires that employee's activity at time of accident bear a sufficiently close relationship to his employment, and that accident be proximately caused by his employment. Labor Code, § 3600.

2. Workmen's compensation 🔑643

The theory upon which compensation is awarded in class of accidents involving death and injuries to employees while on street is that causal connection between employment and injury, which is essential to make it compensable, consists in fact that employment requires presence of employee upon street and fact that injury was caused by some human or mechanical instrumentality incidental to use of street. Labor Code, § 3600.

3. Workmen's compensation 🔑605

Policy of liberal construction of workmen's compensation laws requires any reasonable doubt as to whether act of an employee is contemplated by employment to be resolved in favor of employee. Labor Code, § 3600.

4. Workmen's compensation 🔑714

When an employment places an employee at any given place to do his work, indoors or outdoors, and employee so placed is injured because at work in that spot, compensation will be awarded for injury, except in field of disease, where it is needed to distinguish industrial from non-industrial diseases. Labor Code, § 3600.

5. Workmen's compensation 🔑610

Under workmen's compensation law, where there is an incidental or causal connection between employment and accident causing injury, injury is deemed to have "arisen out of employment," even when connection is somewhat remote and direct and immediate agency of injury is foreign. Labor Code, § 3600.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Arise Out of Employment".

6. Workmen's compensation 🔑702

Death of waitress who was accidentally killed by shot fired at a customer by his wife while waitress was standing at a cash register in her place of employment was compensable as occurring while she was acting within course of and was discharging the duties of her employment. Labor Code, § 3600.

7. Workmen's compensation ⚷1359

The theory upon which workmen's compensation laws were enacted was that evidence should not be required of workman's environment, but that in order to receive an award he needs to show merely that his work brought him within range of danger by requiring his presence in precincts of his employer's premises at time peril struck. Labor Code, § 3600.

8. Workmen's compensation ⚷613

Under workmen's compensation law, compensable injuries need not be of kind anticipated by employee or peculiar to employment, and to sustain an award it is sufficient that injury results from a danger to which employee was exposed as an employee.

9. Workmen's compensation ⚷610

The test whether an injury is compensable, in cases where accident originates from a force disconnected with employment, is whether employee is exposed to greater danger by reason of his assignment than that to which public is subjected, whether cause is an act of God or of a mundane inhabitant, and it is sufficient that the work brings claimant within range of peril by requiring his presence there when it strikes. Labor Code, § 3600.

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Leonard, Hanna & Brophy, San Francisco, for petitioners.

T. Groezinger, Attorney for Industrial Accident Commission, San Francisco, for respondents.

BRAY, Justice.

Writ of review seeking annulment of an order granting rehearing, and decision on rehearing, made by respondent Industrial Accident Commission. The original hearing resulted in an order that the claimant take nothing by reason of the claim filed, based on a finding that the death of the insured's employee did not arise out of the employment. Thereafter, the commission granted a rehearing and filed its decision on rehearing, which granted an award to deceased's minor child, Barbara Ann Baxter, based on a finding that the accident resulting in death did arise out of the employment.

Question Presented.

Is the death of an employee compensable where it occurred while she was discharging the duties of her employment, and was caused by her being accidentally struck by a shot fired at a customer by his irate wife?

Facts.

There is no dispute as to the facts. Eleanor G. Baxter was employed by the Greenville Inn as co-manager. Among her duties was that of relieving various employees in their duties, including relieving the bartenders in the hotel bar when they were away during meal periods.

On the evening of December 3, 1948,. Mrs. Baxter relieved the bartender, Ernest Montoya, at about 7:00 p. m. A customer named John Walker came in, sat down at the bar and was served a bottle of beer by Mrs. Baxter. Receiving a bill in payment, Mrs. Baxter went to the office at the end of the bar, got change therefor from the safe, and returning to the cash register on the back bar, stood facing the cash register with her back to the bar and Walker. While Mrs. Baxter was in this position Katherine Walker, the wife of the customer, entered the premises, approached Walker, and after first cursing him, fired a bullet from a revolver. The bullet missed Walker, ricocheted off the bar and struck Mrs. Baxter in the back, inflicting the injuries which resulted in her death a few minutes later. There is no evidence as to what occurred between the husband and wife prior to her entry in to the bar, but it is reasonable to assume that her action was the culmination of an earlier quarrel between the two which had its inception away from the bar premises. Mrs. Baxter was not involved in any altercation, verbal or otherwise, or discussion with either of the quarrelling principals during the time in question. There is no evidence of any prior shootings or disturbances of any kind in the bar. Deceased left as her sole dependent a minor child, Barbara Ann.

Did the Accident "Arise Out of" the Employment?

[1] The Workmen's Compensation Act provides for liability of an employer for "any injury sustained by his employees arising out of and in the course of the employment * * *" Labor Code, § 3600. Essential conditions include the following: "(b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment. (c) Where the injury is proximately caused by the employment, either with or without negligence." A reasonable construction of the statute would be that (b) refers back to and elaborates on the phrase "arising * * * in the course of" and (c) refers back to and elaborates on the phrase "arising out of." So construed, there are two different requirements—one, that the *activity of the employee* at the time of the accident bears a sufficiently close relationship to his employment, and another, that the *accident* is proximately *caused* by the employment.

Admittedly Mrs. Baxter was "performing service growing out of and incidental to [her] employment and [was] acting within the course of" it. The serious question is whether the injury was "proximately caused by the employment." In determining this question, it is advisable to consider the trend of the courts in determining what is considered "proximately caused by the employment."

When the Workmen's Compensation Act was first adopted in California the courts construed this phrase very narrowly. In spite of the requirement in the original act that "it shall be liberally construed * * * with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment", Stats. 1917, p. 877, § 69,[1] the courts applied many of the narrow rules of "proximate cause" as laid down in the law of negligence, with the result that recovery by a workman for injuries received was considerably limited.

As time went on, however, the courts more and more adopted the spirit of the act and more and more began to throw off the restrictive bonds of the rules they had prescribed, and to interpret the act liberally so that the workman might receive compensation for injuries received in the course of his employment.

[2] One of the departures was in "street risk" cases, of which Frigidaire Corp. v. Industrial Acc. Comm., 103 Cal.App. 27, 283 P. 974, is an example. There, the employee was required by his employment to travel between various cities by public transportation. While standing on the edge of a railroad station platform adjacent to a street, identifying his hand luggage which had just been deposited there by the bus driver, he was struck and killed by a stray bullet fired by a policeman at a suspected criminal whom the officer was pursuing along the said street. The court affirmed an award to the employee's dependents. Like most of the other street cases it attempted to distinguish risks peculiar to streets from those which apply both to streets and houses. "The theory upon which compensation is awarded in the class of accidents above mentioned is that the causal connection between the employment and the injury, which is essential to make it compensable, consists in the fact that the employment requires the presence of the employee upon the street and the fact that the injury was caused by some human or mechanical instrumentality incidental to the use of the street." 103 Cal.App. at page 31, 283 P. at page 975. It paints a rather fearful picture of the dangers of being on a public street, thus (quoting from another case): "'The street becomes a dangerous place when street brawlers, highwaymen, escaping criminals, or violent madmen are

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[1] Codified into section 3202 of the Labor Code, which reads: "The provisions of Division IV [which includes section 3600] and Division V of this code shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment."

afoot therein, as they sometimes are. The danger of being struck by them by accident is a street risk because it is incident to passing through or being on the street when dangerous characters are abroad. Particularly on the crowded streets of a great city, not only do vehicles collide, pavements become out of repair, and crowds jostle, but mad or biting dogs may run wild, gunmen may discharge their weapons, police officers may shoot at fugitives fleeing from justice, or other things may happen from which accidental injuries result to people on the streets, which are peculiar to the use of the streets, and do not commonly happen indoors.' * * *" 103 Cal.App. at page 30, 283 P. at page 975. Although the opinion seems to place liability solely upon the fact that a street has more risks than other places, it quotes, apparently with approval, the following language from Globe Indemnity Co. v. Industrial Acc. Comm., 36 Cal.App. 280, 171 P. 1088: "'The causative danger was peculiar to the work, in that, had he [the employee] not been upon the street in the course of his duty, he would not have been injured.'" 103 Cal.App. at page 31, 283 P. at page 975.

[3] Then there are the "horseplay" or "skylarking" cases. At first in California recovery was not permitted an employee who was injured through horseplay or skylarking of his fellow employees. Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 P. 212, L.R.A. 1916F, 1164; Fishering v. Pillsbury, 172 Cal. 690, 158 P. 215, and many others. But in Pacific Emp. Ins. Co. v. Industrial Acc. Comm., 26 Cal.2d 286, 158 P.2d 9, 159 A.L.R. 313, this rule was changed and the holding in Coronado Beach Co. v. Pillsbury, supra, and the other cases expressly overruled. The court pointed out that the Legislature intended that the Workmen's Compensation Act be liberally construed, and that in the recent decisions of the courts this policy had found repeated expression. It quoted from Tingey v. Industrial Acc. Comm., 22 Cal.2d 636, 140 P.2d 410, as follows, 26 Cal.2d at page 289, 158 P.2d at page 11: "In the Tingey case, supra, the court declared that 'any reasonable doubt as to whether the act of the employee is contemplated by the employment should be resolved in favor of the employee in view of the policy of liberal construction of the workmen's compensation laws.' [22 Cal.2d at page 64] [140 P.2d 410, at page 413]" and from California Cas. Ind. Exch. v. Industrial Acc. Comm., 21 Cal.2d 461, 132 P.2d 815: "'It is not indispensable to recovery however, that the employee be rendering a service to his employer at the time of the injury. [Citations.] The essential prerequisite to compensation is that danger from which the injury results be one to which he is exposed as an employee in his particular employment'." It then said, 26 Cal.2d at page 294, 158 P.2d at page 14: "Considering, as we may, the propensities and tendencies of mankind and the ordinary habits of life, it must be admitted that wherever human beings congregate, either at work or at play, there is some frolicking and horseplay. * * * Accordingly, an injury sustained by a nonparticipating employee through the horseplay of fellow workers arises 'out of' and 'is proximately caused by the employment' within the meaning of section 3600 of the Labor Code."

Then we have cases where the courts have held that because the thing that injured the employee was an instrumentality of the employer, the injury is compensable even though the force which actually was responsible for the injury came from outside the employer's premises.

The first case on this subject was Kimbol v. Industrial Acc. Comm., 173 Cal. 351, 160 P. 150, L.R.A. 1917B, 595, Ann.Cas. 1917E, 312. There a dishwasher working in a restaurant was injured by the floor in a rooming house above the restaurant premises giving way and striking him. This floor was not included in the employer's lease, nor did he have any control whatever thereof. In holding that this injury arose out of the dishwasher's employment the court said that the giving way of the floor was due to the fact that the tenant of the rooming house unauthorizedly used it for storage purposes, and then stated, 173 Cal. at page 354, 160 P. at page 151: "But because of this unauthorized use of the floor above for storage purposes those below were in fact, in danger of injury from a collapse of the floor, and in that sense the place in which Douglas [the injured employee] was required to do all his work was an unsafe place. The danger was one peculiar to that very place—an incident of the particular premises used as they were being used—and it is not unreasonable to say that Douglas was *specially* exposed to that danger by reason of his employment. Solely by reason of and in pursuance of such employment he was required to remain in this unsafe place exposed to this danger of a collapse of the ceiling of the room in which he was constantly at work." It would seem that the unauthorized use of the floor was a false factor, and that actually the award was permitted because the dishwasher's employment caused him to be at a point which became a source of danger.

In Pacific Indemnity Co. v. Industrial Acc. Comm., 86 Cal.App.2d 726, 195 P.2d 919, the employee was injured when an explosion in a plant across the street caused a window in the plant where the employee was working to strike the employee. In supporting an award for the injuries received the court labors a bit in pointing out that the window which struck the employee was an instrumentality of the employer and for that reason constituted the proximate cause of the accident. It even said, 86 Cal.App.2d at page 730, 195 P.2d at page 922: "The frame was one of the conditions or incidents of the employment, directly connected with it and out of which alone the injury resulted." Again in Enterprise Dairy Co. v. Industrial Acc. Comm., 202 Cal. 247, 259 P. 1099, 1100, where an employee was injured by the falling, due to an earthquake, of a two story building adjoining his employer's garage, in which the employee was then working, the court held the employer liable, because the falling of such building through the garage roof broke milk bottles which the employee was handling, and hence "he was injured by the broken glass and not by the earthquake." While this and other similar cases labor somewhat to show that the actual substance which injured the employee was an instrumentality of the employer, a real analysis of the facts and rulings in these cases shows that actually the courts were allowing compensation because his employment brought the employee into what became a position of danger even though that danger was not, and in many instances could not have been, foreseen either by the employer or employee, and even though the risk was not peculiar to the particular location.

[4, 5] As far back as 1930 a writer in 18 Cal.Law Review, p. 562, said: "When an employment places an employee at any given place to do his work, indoors or outdoors, and the employee so placed is injured because at work in that spot, compensation should be awarded for the injury, except in the field of disease where it is needed to distinguish industrial from non-industrial diseases." The trend of the decisions in this state since that date has been to support that doctrine, although, as pointed out, the courts have been reluctant to use that language. An illustration of a case in which that doctrine is applied, but where the court went a long way around the barn to keep from expressing the doctrine, is General Accident Fire & Life Assurance Corp. v. Industrial Acc. Comm., 186 Cal. 653, 200 P. 419. There an employee was repairing tires in his employer's garage. In an altercation between his employer and two customers, in which the employee in nowise participated, his employer fired a shot from a pistol, apparently at one of the customers. This shot missed its target, struck the floor, and glancing, hit the employee, who was then in another part of the garage. The court sustained a compensation award as one "arising out of * * * the employment." In doing so the court said that "there is present a causal connection between the employment and the incident which resulted in the injury * * *" because "it can fairly be said that to some extent the risk of shooting, hold-ups, assaults, and the like, has in recent years become so closely associated with the garage business that it may be said that employment in such an industry is hazardous. * * * We think it can be said that Shrout [the injured employee] was injured, not merely because he happened to be in the garage

at the time of the shooting, but because he was there, regularly employed, and hence exposed to all the dangers which might arise in the conduct and transaction of the business of his employer, including the reasonable protection of the latter's property and right to transact his business in an orderly manner." 186 Cal. at pages 657–658, 200 P. at page 421. Just why the court should characterize the garage business as a "hazardous" one we are not quite able to understand. Actually, the real basis of the decision is shown by the quotation from Archibald v. Workmen's Compensation Commissioner, 77 W.Va. 448, 451, 87 S.E. 791–793, L.R.A.1916D, 1013, which the court adopts, 186 Cal. at page 657, 200 P. at page 421: "'* * * if there is an incidental or causal connection between the employment and the accident, the injury is deemed to have arisen out of the former, even when the connection is somewhat remote, and when the direct and immediate agency of injury is foreign.'" Nor do we feel that in Frigidaire Corp. v. Industrial Acc. Comm., supra, 103 Cal.App. 27, 283 P. 974, it was necessary for the court to paint such a dire picture of the hazards of appearing upon the public streets. Actually the decision in the Frigidaire case is based upon the fact that had the employee not been where he was in the course of his duty he would not have been injured. This is shown by the quotation we have heretofore set forth which the court took from the Globe Indemnity case, 36 Cal.App. 280, 171 P. 1088.

[6] In the case at bar, if we desired to follow the specious reasoning in the cases which place liability on the fact that the instrumentality of the employer was the last one in a chain of circumstances leading to the employee's injury, we could say that it was the bar, an instrumentality of the employer, which caused the bullet to ricochet and strike Mrs. Baxter. However, it is not necessary to do so. It is only necessary to hold that the death of Mrs. Baxter arose out of her employment because her employment required her to be in what turned out to be a place of danger.

The only California case in which there is a somewhat similar state of facts as those in our case, is Associated Indemnity Corp. v. Industrial Acc. Comm. and Fred Zurbuchen, 43 Cal.App.2d 292, 110 P.2d 676, in which the court reaches a conclusion exactly opposite to the one reached by us. There a farm worker was struck in the neck by a bullet fired by a boy on adjacent premises who was shooting at a bird. The court reversed an award made by the Industrial Accident Commission in favor of the employee on the ground that there was no causal connection between the injury and the employment other than the mere fact that the employment brought the injured person to the place of injury. It based its decision largely upon the language in California Casualty Ind. Ex. v. Industrial Acc. Comm., 190 Cal. 433, 213 P. 257, a case in which an employee was killed while crossing the street to get into his parked truck after having stopped at a cafeteria for lunch and then at a cigar store. The court there held that although in the scope of his employment the injury did not arise out of the employment because at the moment he was not rendering any service to his employer. The language upon which the court in the Zurbuchen case relied mostly was: "There must be some connection between the injury and the employment other than the mere fact that the employment brought the injured party to the place of injury." 190 Cal. at page 436, 213 P. at page 258. However, it is plain that the decision was based on the fact that it was not his employment that brought him to the place of injury but "His movements during the time he was getting his noonday lunch were dictated wholly by his own desires * * *." 190 Cal. at page 437, 213 P. at page 258. "He had no business to transact for his employer in that vicinity." 190 Cal. at page 437, 213 P. at page 258. Thus, the circumstances in the California Casualty case were not such as to make its language authority for the holding in the Zurbuchen case. It is true that in the Zurbuchen case the court distinguished its facts from the Frigidaire Corp. case, supra, by pointing out that the latter case came in the category of street risk cases. However, the absurdity of the distinction is realized when one considers that had the farm laborer in the Zurbuchen case been driving his employer's truck down the road instead of being in the employer's field, when struck by the stray bullet, the court would have permitted compensation under the doctrine of the "street risk" cases. Thus, in our case, had Mrs. Baxter, instead of being in the barroom, been just outside of the door and going on an errand for her employer, there would be no question of her child's right to compensation. There is another ground upon which the Zurbuchen case could be distinguished from this, and that would be by applying the logic of the decision in General Accident Fire & Life Assurance Corp. v. Industrial Acc. Comm., supra, 186 Cal. 653, 200 P. 419, where the court, as we heretofore pointed out, characterized a garage as a place in which the employees run the risk of "shooting, holdups, assaults, and the like," 186 Cal. at page 657, 200 P. at page 421, and hence a hazardous place of employment. It is a well known fact that persons who are overcome by business and other worries, wife trouble, etc., are more likely to go to a bar to reflect on their situation than to a soda fountain, a grocery store or any other place. So, it might be said, in the logic of the last mentioned case, that irate wives who desire to shoot their husbands will be more likely to find them in bars than in other places, and hence working in a bar is at least as hazardous an occupation as working in a garage. However, as we do not agree with the premise in the General Accident Fire & Life Assurance Corp. case, we, of course, do not base our decision upon that ground here. We mention it to point out how unrealistic it is to attempt to find hazards as a basis of decision when the fact is that the decisions have really been based upon the fact that when a person's employment brings him in to a position which becomes dangerous and he is there acting in the scope of his employment, his injury is compensable. The decision in the Zurbuchen case is a throwback to the narrow interpretation of the Workmen's Compensation Act and against the trend of the later decisions, and hence should be disregarded.

[7-9] The latest trend is shown by statements such as the following: "The theory upon which the workmen's compensation laws were enacted was that evidence should not be required to establish all the factors of the workman's environment, but that in order to receive an award he needs show merely that his work brought him within the range of danger by requiring his presence in the precincts of his employer's premises at the time the peril struck. * * Compensable injuries need not be of the kind anticipated by the employer or peculiar to the employment. * * * It is sufficient that the injury results from a danger to which he was exposed as an employee." Pacific Indemnity Co. v. Industrial Acc. Comm., supra, 86 Cal.App.2d 726, 728, 195 P.2d at page 920. This case also cites with approval the following from Harvey v. Caddo De Soto Cotton Oil Co., 199 La. 720, 6 So.2d 747, 750: "'* * * that his death was due to the fact that his employment necessitated that he be at the place where the accident occurred and that, therefore * * * the accident arose out of, and was incident to the employment.'" Pacific Indemnity Co. v. Industrial Acc. Comm., supra, 86 Cal.App.2d at page 733, 195 P.2d 919, at page 923. Referring to a Louisiana case (which is not cited) the court said, 86 Cal.App.2d at page 732, 195 P.2d at page 923: "His death was due to the fact that his work necessitated his presence there. Therefore, under a liberal interpretation of the compensation act, the accident arose out of and was incidental to the employee's duties. The court there declared that the test, in cases where the accident originates from a force disconnected with the employment, is whether the employee is exposed to greater danger by reason of his assignments than that to which the public is subjected, whether the cause is an act of God or of a mundane inhabitant." "'It is sufficient that the work brings the claimant within the range of peril by requiring his presence there when it strikes.'" Pacific Emp. Ins. Co. v. Industrial Acc. Comm., supra, 26 Cal.2d 286, 293, 158 P.2d 9, 13, 159 A.L.R. 313. "In summary, it is clear to the familiar observer, reporting objectively, that a trend

continues toward liberalization of the Workmen's Compensation laws, through adjudicative and legislative processes * * *." 1 Survey of California Law, p. 86.

The award is affirmed.

PETERS, P. J., concurs.

WARD, Justice.

I concur.

I agree that the order affirming the award is the correct disposition of this writ of review. The appellate courts of this state have adopted the rule that when the employment requires the employee to occupy a position that subsequently may be deemed to be a position of danger and an injury occurs to the employee such injury is not only an injury occurring in the course of employment but is one which arises out of the employment and is proximately caused by the employment. The main opinion cites sufficient authority to uphold that rule. Whether the rule is the result of discarding "narrow" views and adopting "liberal" construction is of no consequence. It is an established rule and should be accepted and followed without *official* criticism.

I do not approve of some of the statements that appear in the main opinion, i. e.:

(a) That the use of the revolver was the culmination of an "earlier quarrel." In my opinion, this statement is based upon surmise and not upon any inference based on the evidence as shown in the record.

(b) That it is "a well known fact" that persons overcome by business or domestic worries are more likely to go to a "bar" to reflect on their situation than to "any other place." Based on my observation, this statement is not correct. During the oral argument, in response to a question along that general line the attorney for the Industrial Accident Commission specifically stated that the commission did not request a decision based upon that ground.

As I read the main opinion, it appears that reliance for the conclusion reached is based in part on the authority of recent decisions in "frolicking and horseplay" cases. The facts in those cases are not analogous and need not be mentioned in the present case. The "skylarking" cases arose from injuries caused through play instead of work by or between two or more employees. There is nothing characteristic of "frolicking" when a wife intrudes into a place of business with intent to kill her husband. At the time of the hearing of the present petition before the referee of the Industrial Accident Commission the woman who caused the death of the decedent herein was an inmate of the state prison for women at Tehachapi on a conviction of murder.

The mention of unnecessary true or false matters leads to confusion in future cases when referred to as precedent.

96 Cal.App.2d 26

SANCHEZ v. TORQUEMADA et al.

Civ. 14092.

District Court of Appeal, First District, Division 2, California.

Feb. 9, 1950.

Suit by Anona Sanchez, executrix of estate of Jose Sanchez, also known as Jose Sanchez Valencia, deceased, against Antonio Torquemada and Paula Sanchez Torquemada to have a deed, absolute in form, declared to be a mortgage.

The Superior Court of Alameda County, James G. Quinn, J., entered judgment for plaintiff, and defendants appealed.

The District Court of Appeal, Dooling, J., held that evidence sustained finding that deed was intended as a mortgage, and that where laches was not pleaded or urged in trial court, it was not open to defendants on appeal.

Judgment affirmed.

1. Appeal and error ⚿989

The rule that where evidence is in sharp conflict, prevailing party must establish his claim by clear and convincing evidence, is one for guidance of trial court, and an appellate court's inquiry ends when it ascertains that there is substantial evidence to support trial court's finding.

2. Mortgages ⚿38(5)

Where grantor confined in jail on a criminal charge, accepted money from his sister and brother-in-law for his defense and deeded realty on which he had been residing to them, evidence that subsequent to grantor's release from jail, he and his wife lived in home on the realty, and continued to live there until grantor's death, that grantor made frequent demands upon sister and brother-in-law for reconveyance of realty to him, that they acknowledged that grantor owned realty and promised to reconvey it, supported finding that deed was intended as a mortgage.

3. Appeal and error ⚿173(10)

Where laches was not pleaded nor urged in any manner in trial court, it was not open to appellants on appeal.

Raymond A. Ferrario, Oakland, for appellants.

Cyril Roche, Philip Silver, Hayward, Stanley C. Smallwood, Oakland, for respondents.

DOOLING, Justice.

Defendants appeal from a judgment determining a deed absolute in form to be a mortgage and ordering defendants to reconvey the property upon the payment of an amount determined by the court to be secured thereby.

[1] No question is made of the correctness of the amount to be paid but appellants argue that the finding that the deed was in fact a mortgage is not supported by the evidence. The evidence was in sharp conflict and appellants invoke the clear and convincing evidence rule. It is now settled that this rule is one for the guidance of the trial court and an appellate court's inquiry ends when it ascertains that there is substantial evidence to support the trial court's finding that a deed absolute in form was intended as a mortgage. Beeler v. American Trust Co., 24 Cal.2d 1, 7, 147 P.2d 583.

Looking to the evidence most favorable to respondent it appears that respondent's testator was confined in jail on a criminal charge in 1931, that appellants who are testator's sister and brother-in-law advanced $500 for his defense and the testator deeded the property on which he had been residing to them. Appellant Mrs. Torquemada testified: "He told me he was putting the property in my name and my husband's name. * * * Due to the debt, because he could not pay me." When the testator was released from jail he and his executrix, who became his wife, went to live in the home on the property in question and continued to live there until the testator's death. There is evidence of frequent demands by the testator upon appellant Torquemada for the reconveyance of the property to him and acknowledgments by Torquemada that testator owned the property and promises to reconvey it. There is also evidence that in 1931 the value of the property was from two to six times the amount of $500 advanced by appellants.

[2] Much of this evidence was flatly contradicted but the resolution of the conflicts rested with the trial court and the above recital establishes that there was substantial evidence to support the finding that the deed was intended as a mortgage.

[3] Appellants also argue that the right to relief was barred by laches. Laches was not pleaded nor urged in any manner in the trial court. It is therefore not open to appellants on appeal. Allen v. Meyers, 5 Cal.2d 311, 316, 54 P.2d 450; Ellis v. Union Trust Co., 219 Cal. 50, 53, 25 P.2d 1; Busick v. Mandeville, 80 Cal.App.2d 853, 856, 183 P.2d 362; Lotts v. Board of Park Comm'rs, 13 Cal.App.2d 625, 636, 57 P.2d 215.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

95 Cal.App.2d 778

ALONSO v. HILLS et al.

Civ. 13944.

District Court of Appeal, First District,
Division 2, California.
Jan. 30, 1950.

Arthur Alonso sued Horace Hills, Jack Lloyd and Rockaway Quarries, Inc., to recover for damages to plaintiff's property and interference with its enjoyment as result of recurrent blastings in operation of corporate defendant's quarry, and also for injunctive relief.

A judgment in favor of the plaintiff against the corporate defendant was entered by the Superior Court, San Mateo County, Clark Clement, J., and the defendants appealed.

The District Court of Appeal, Nourse, P. J., held that both damages and injunctive relief could be based on finding that blastings occurred in such surroundings as to cause them to be considered as ultra hazardous activities, and that showing of negligence was not required.

Affirmed.

1. Appeal and error ⚷151(2)

Where no judgment was rendered against individual defendants in action against the individual defendants and a corporation, individual defendants were not "parties aggrieved", entitled to appeal under statute, and their appeal would be dismissed. Code Civ.Proc. § 938.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Party Aggrieved".

2. Pleading ⚷1

The basic principle of the Code system is that the administration of justice shall not be embarrassed by technicalities, strict rules of construction, or useless forms, and no error or defect in the pleading is to be regarded unless it affects substantial rights. Code Civ.Proc. § 475.

3. Judgment ⚷251(1)

The plaintiff may be granted any relief consistent with case made by complaint and embraced within the issues. Code Civ.Proc. § 580.

4. Appeal and error ⚷1039(1)

The matter of pleading becomes unimportant when a case is fairly tried upon the merits and under circumstances which indicate that nothing in the pleadings misled unsuccessful litigant to his injury.

5. Pleading ⚷52(2)

The recurrent blastings in operation of defendant's quarry, causing cumulative injury to plaintiff's property and interference with its enjoyment, could be considered as one line of conduct in character of a nuisance giving rise to one cause of action, without necessity of separate statement of separate blastings. Code Civ.Proc. § 430, subd. 5.

6. Appeal and error ⚷1032(1)

In action for damages and injunctive relief against recurrent blastings in operation of defendant's quarry, even if defendant were entitled to have separate acts of blastings stated separately in complaint, overruling of demurrer to complaint on such ground did not require reversal after trial on merits where there was no showing of prejudice. Code Civ.Proc. § 430, subd. 5.

7. Appeal and error ⚷1040(10)

Overruling demurrer to complaint for uncertainty in allegations as to plaintiff's children and their damage did not result in prejudicial error where no point of the recovery was based on findings of injury to plaintiff's children.

8. Explosives ⚷12

Blasting in populated surroundings in vicinity of dwelling places or places of business is considered an "ultra hazardous activity" for miscarriage of which actor is held strictly liable in damages regardless of degree of care with which blasting is performed.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Ultra Hazardous Activity".

9. Nuisance ⚷3(6), 19

Except when justified by necessity or utility which causes it to be reasonable under circumstances and executed with all required care, blasting in populated surroundings which causes injury is considered tortious and open to injunction, mostly under designation of a "nuisance per se."

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Nuisance Per Se".

10. Nuisance 🔑3(6), 32

Blasting in remote places, where there is little danger of injury, is not considered a "nuisance per se" and is actionable only when negligence or tortious intent is alleged and proved.

11. Nuisance 🔑32, 48

In action for damages and injunctive relief against recurrent blastings in operation of defendant's quarry, where it was alleged that blastings occurred in populated surroundings, and defendant did not contend that dangerous blasting was reasonable and injury unavoidable under all circumstances, both damages and injunctive relief could be based on either negligent blasting or on blasting in such surroundings as to cause the blasting to be ultra hazardous.

12. Nuisance 🔑32, 48

Even if plaintiff seeking to recover for damages and injunctive relief against recurrent blastings in operation of defendant's quarry had proceeded on erroneous assumption that proof of negligence was essential, such fact would not prevent recovery without proof or finding of negligence if facts alleged and found, after eliminating negligence as surplusage, would leave a good cause of action on ground that blasting occurred under such circumstances as to constitute an ultra hazardous activity and if defendant was not misled to its injury.

13. Pleading 🔑375

The fact that plaintiff may have alleged more than was required of him does not impose upon him the obligation of proving anything beyond facts essential to constitute his cause of action.

14. Appeal and error 🔑1032(1)

In order to justify reversal of judgment because of defective findings, it must affirmatively appear not only that substantial injury has been caused and that substantial rights have been affected but also so that a different result would have been probable if defect had not occurred.

15. Appeal and error 🔑1071(3)

In action for damages as result of recurrent blastings in operation of defendant's quarry, even if finding that plaintiff's property was situated in community of approximately 300 homes and approximately 200 yards distant from defendant's quarry was not supported by evidence because it was shown that there were only 85 homes in the community and that the distance was 300 yards, judgment for plaintiff was not required to be reversed, where different result would not be reached by changing finding.

16. Appeal and error 🔑1071(1)

The incorrect finding of plaintiff's sole ownership of real property allegedly damaged by defendant's blasting operations, whereas concededly he owned it in joint tenancy with his wife, did not require a reversal, where plaintiff's recovery had already been reduced by trial court one-half on that ground.

17. Appeal and error 🔑995

An appellate court may reject specific evidence which is obviously false or inherently improbable, but mere conflicts in the evidence, which are solely for decision of trier of facts, cannot take place of inherent improbability or obvious falsity and lead to wholesale rejection of evidence in favor of one party.

18. Evidence 🔑590

In action for damages as result of recurrent blastings in operation of defendant's quarry, fact that some of plaintiff's witnesses were also bringing separate damage actions for blasting injury against defendant at most went to weight of testimony of such witnesses and did not require that their testimony be entirely disregarded.

19. Appeal and error 🔑891

In action for damages as result of recurrent blastings in operation of defendant's quarry, defendants could not show falsity of testimony of plaintiff's witnesses as to injury of buildings by quoting on appeal excerpts from scientific papers and addresses not put in evidence.

20. Appeal and error 🔑1012(1)
Evidence 🔑574

Regular scientific expert testimony is not entitled to preference over testimony as to facts, and relative weight must be decided by trier of facts.

21. Nuisance 🔑49(5)

In action for damages to plaintiff's property and interference with its enjoyment as result of recurrent blastings in operation of defendant's quarry, finding that plaintiff's property was of reasonable value of $5,000 before the blast was supported by plaintiff's testimony that he figured valuation of his house at that time was in neighborhood of $5,500.

22. Appeal and error 🔑1012(1)

Defendant's attack on plaintiff's evidence as to valuation of his house before damage caused by blasting at defendant's quarry on ground of contradictions in his statements as to his cost price went to weight of evidence only, of which trier of facts was sole judge.

23. Appeal and error 🔑996
Evidence 🔑595

From evidence of visible injury to plaintiff's house caused by blasting at defendant's quarry an inference could be drawn that also the general structural strength of the house must have suffered, and whether such inference should be drawn was for trier of facts.

24. Evidence 🔑587

Direct evidence may be disbelieved and contrary circumstantial evidence relied upon to support a verdict or finding.

25. Nuisance 🔑50(1)

Plaintiff was entitled to recover for damage to structural support of his house as result of blasting operations at nearby quarry independently from costs of repair required only to make the house serviceable.

26. Damages 🔑111

Where there is permanent injury to house, the difference in market value of the property before and after the injury is correct measure of damages.

27. Nuisance 🔑50(7)

Evidence supported finding that amount of damage to plaintiff's house as result of blasting operations at defendant's nearby quarry was $1,650.

28. Nuisance 🔑50(1)

Discomfort and annoyance to occupant of land and members of his household are distinct grounds of compensation for which in ordinary cases the person in possession is allowed to recover in addition to harm to his proprietary interest.

29. Nuisance 🔑50(1)

In action for damages to plaintiff's property and interference with its enjoyment as result of recurrent blasting operation of defendant's quarry, among the bodily and mental harms which are compensable must be included continual fear of danger in case of repetition in which persons on plaintiff's property live. Civ.Code. § 3479.

30. Nuisance 🔑49(5)

In action for damages to plaintiff's property and interference with its enjoyment as result of recurrent blastings in operation of defendant's quarry, amount of recovery for discomfort and annoyance suffered by plaintiff should be left to discretion of trier of facts without necessity of specific evidence as to such amount. Civ.Code, § 3479.

31. Appeal and error 🔑1071(1)

Where defendant's liability for damages to plaintiff's property and interference with its enjoyment as result of recurrent blastings in operation of its quarry did not depend on whether blastings were in violation of county ordinances, trial court's findings that blastings were in violation of ordinances were immaterial and could be disregarded as surplusage.

32. Nuisance 🔑49(5)

In action for damages to plaintiff's property and interference with its enjoyment as result of recurrent blastings in operation of defendant's quarry, finding that a three-pound rock from defendant's quarry was thrown on plaintiff's property by blasting on a certain date, destroying a bench, was supported by evidence.

33. Nuisance ⚷49(4)

In action for damages to plaintiff's property and interference with its enjoyment as result of recurrent blastings in operation of defendant's quarry, evidence as to fright and distress caused to plaintiff's children, members of his household, was admissible, where damage to plaintiff from that cause was expressly pleaded.

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Hoffman & Draper, San Mateo, Millington, Dell' Ergo, Weeks & Morrissey, Redwood City for appellant.

Fahey, Bocci & Gallen, Daly City, for respondent.

NOURSE, Presiding Justice.

[1] Defendants Horace Hills, Jack Lloyd, and Rockaway Quarries, Inc. appeal from a judgment ordering the latter defendant to pay plaintiff damages in the amount of $2,650, reduced subsequently by consent to $1,725 on denial of a motion for a new trial, and enjoining it from carrying on blasting operations in its quarry so as to disturb plaintiff and his real property in manners stated. Against the individual defendants no judgment was rendered; they are not parties aggrieved entitled to appeal under section 938 of the Code of Civil Procedure and their appeal must be dismissed. 2 Cal.Jur. 215, 216, 218; Hibernia Savings & Loan Soc. v. Ordway, 38 Cal. 679; Spencer v. Troutt, 133 Cal. 605, 609, 65 P. 1083. Defendant in singular will hereafter refer to the corporate defendant.

Plaintiff's action was based in substance on allegations that he was owner and occupant of land and a dwelling place in the heart of a community of 300 homes, known as Rockaway Beach and 200 yards distant from the quarry of defendants; that defendants on November 2, 1946, February 3, 1947, and on many occasions before and after, conducted blasting operations in their quarry in a negligent manner so as to cause violent concussions in the nature of an earthquake thereby injuring plaintiff's real property and building so that its plastered walls were severely cracked; window sills stripped from their normal position; a rock and brick barbecue pit and cement terrace walls cracked and damaged, window panes and a mirror broken, amounting to a damage of $1,100; that the building was loosened and weakened in its supports to a damage of $2000, that the explosions disturbed the enjoyment of the dwelling place by plaintiff and his family, shocked plaintiff's nerves and injured his health; caused his children great fear impairing their health and causing them to be nervous and irritable to plaintiff's further damage of $10,000. Moreover $5,000 exemplary damages were claimed based on malice and wanton disregard of plaintiff's rights and feelings. Continuation of the blasting and threat of continuation in the future to the damage of the plaintiff were alleged as requiring injunctive relief.

A demurrer to the complaint on the ground, among others, that several causes of action were united without stating them separately was overruled, and trial had before the court sitting without a jury, leading to the judgment stated before.

No exemplary damages were granted. Of the $2,650 compensatory damages $1,650 was for damage to and depreciation of the property and $1,000 for plaintiff's distress in body and mind, discomfort, annoyance, fright and shock; fright or distress of the children is nowhere expressly mentioned. There is no finding of negligence and there was no testimony as to lack of care in the manner in which the blasting was executed except as shown by the injurious effect. The reduction by half of the amount of $1,650 granted for damage to the property was motivated by proof that the property was owned by plaintiff and his wife in joint tenancy.

[2-4] Appellant asserts some formal errors without a showing of resulting prejudice. We therefore open our discussion with a statement of general principles of pleading established in this state, quoted from Buxbom v. Smith, 23 Cal.2d 535, 542-543, 145 P.2d 305, 308, as follows:

"[T]he basic principle of the code system in this state is that the administration of justice shall not be embarrassed by technicalities, strict rules of construction, or useless forms. * * * No error or defect in a pleading is to be regarded unless it affects substantial rights. Code Civ.Proc. sec. 475 * * * In defining the relief which may be awarded to plaintiff where an answer in the action has been filed, section 580 of the Code of Civil Procedure provides that 'the court may grant him any relief consistent with the case made by the complaint and embraced within the issues.' Moreover, the matter of pleading becomes unimportant when a case is fairly tried upon the merits and under circumstances which indicate that nothing in the pleadings misled the unsuccessful litigant to his injury."

[5-7] Appellant contends that the demurrer was erroneously overruled in the following respect: the separate acts of blasting furnished separate causes of action which should have been stated separately. Section 430 (5), Code Civ.Proc.; Bowman v. Wohlke, 166 Cal. 121, 135 P. 37, Ann.Cas.1915B, 1011. The recurrent blasting in the operation of defendant's quarry, causing cumulative injury to plaintiff's property and interference with its enjoyment and requiring injunctive relief could conceivably be considered as one line of conduct in the character of a nuisance giving rise to one cause of action, without necessity of separate statement of separate blastings. But even if this were not so and if appellant had been entitled to such separate statement, the overruling of the demurrer would not require reversal after trial on the merits has taken place and where there is no showing of prejudice, but to the contrary the fullness of the trial going into the details of the effect of the separate blastings shows that appellant's defense was not hindered. 2 Cal.Jur. 1011, 1012; Blakeslee v. Tannlund, 25 Cal.App.2d 32, 35, 76 P.2d 216; Mortgage Guarantee Co. v. Smith, 9 Cal.App.2d 618, 621, 50 P.2d 835. The same applies to the further alleged error in overruling the demurrer for uncertainty in the allegations as to respondent's children and their damage. 2 Cal.Jur. 1014. No prejudice seems possible as no point of the recovery was based on finding of injury to the children.

The question whether the complaint was subject to demurrer and whether that demurrer was raised in formally correct manner have therefore become irrelevant.

Appellant further contends that as negligence was specifically pleaded, plaintiff was required to prove it and could not recover where proof and finding of negligence were both absent; he is said to be bound by the theory on which he proceeded. The contention is without merit.

[8-13] Blasting in populated surroundings, in the vicinity of dwelling places or places of business is considered an ultrahazardous activity for the miscarriage of which the actor is held strictly liable in damages regardless of the degree of care with which the blasting is performed. McGrath v. Basich Brothers Const. Co., 7 Cal. App.2d 573, 46 P.2d 981; McKenna v. Pacific Electric Ry. Co., 104 Cal.App. 538, 286 P. 445. Except when justified by necessity or utility which causes it to be reasonable under the circumstances of the case and executed with all required care, such blasting which causes injury is considered tortious and open to injunction, mostly under the designation of a "nuisance per se." Blasting in remote places, where there is little danger of injury is not considered a "nuisance per se" and is actionable only when negligence (or tortious intent) is alleged and proved. (Compare Colton v. Onderdonk, 69 Cal. 155, 10 P. 395, 58 Am. Rep. 556 and Munro v. Pacific Coast Dredging etc. Co., 84 Cal. 515, 24 P. 303, 18 Am. St.Rep. 248, relating to blasting within cities, to Houghton v. Loma Prieta Lumber Co., 152 Cal. 500, 93 P. 82, 14 L.R.A.,N.S., 913, 14 Ann.Cas. 1159 involving blasting in an isolated place, on a practically abandoned road.) In this case defendant does not contend that dangerous blasting was reasonable and injury unavoidable under all the circumstances. Both damages and injunctive relief could therefore be based either on negligent blasting or on blasting in such surroundings as to cause the blasting to be ultra hazardous. In his com-

plaint plaintiff alleged not only that the explosions were negligently produced and conducted but also that they occurred in close proximity to the land and dwelling house of plaintiff and that said real property was situated in the heart of a community of approximately 300 homes and 200 yards from the quarry of defendant, which latter allegations seem intended to describe a situation in which blasting injury is actionable per se. It can therefore not be said that plaintiff proceeded on the theory of negligence only, but even if respondent had proceeded on the erroneous assumption that proof of negligence was at any rate essential this would not prevent recovery without proof of finding of negligence if the facts alleged and found, after eliminating the negligence as surplusage, would leave a good cause of action and if appellant was not misled to his injury. In Ambassador Airways, Inc., v. Frank, 124 Cal.App. 56, at page 62, 12 P.2d 127, at page 129, a damage action for injury to an airplane owned by plaintiff but in defendant's possession was based on an express agreement; in so far as the express contract was not applicable to part of the injury for which plaintiff recovered, the judgment was upheld on the ground that the defendant was liable upon the general law and the allegation of an express contract was treated as surplusage. Closer in point of fact although less ample in theoretical discussion are Munro v. Pacific Coast Dredging etc. Co., supra, 84 Cal. 515, 519, 24 P. 303, 304, 18 Am.St.Rep. 248, an action for death caused by blasting, in which case, although "the complaint set forth a careless and negligent explosion of the blast" the Supreme Court upheld an instruction that exercise of the highest degree of care by defendant was no defense, and Opelt v. Al. G. Barnes Co., 41 Cal.App. 776, 778, 183 P. 241, holding that in a damage action for scratches by a vicious leopard in a circus allegations of negligence were surplusage which need not be denied. Compare also Hevener v. Franklin, 52 Cal.App. 594, 595, 199 P. 535; Blair v. Guarantee Title Co., Inc., 103 Cal.App. 260, 270, 284 P. 719; Chaldu v. Amestoy, 16 Cal.App.2d 456, 457, 60 P.2d 875; Costello v. Bowen, 80 Cal.App.2d 621, 625, 182 P.2d 615. "The fact that plaintiff may have alleged more than was required of him, does not impose upon him the obligation of proving anything beyond the facts essential to constitute his cause of action." Pigeon v. W. P. Fuller & Co., 156 Cal. 691, 699, 105 P. 976, 979. Negligence was not essential to plaintiff's cause of action and no injury from the allegation is claimed by appellant or apparent to us.

[14, 15] Appellant contends that the evidence does not support the findings made that plaintiff's property was situated in a community of approximately 300 homes and approximately 200 yards distant from defendant's quarry, the evidence being that there were only 85 homes and that the distance was 300 yards. Even if this were so it would be no ground for reversal. "In order to justify the reversal of a judgment because of defective findings it must affirmatively appear not only that substantial injury has been caused and that substantial rights have been affected but also that a different result would have been probable if the defect had not occurred." Culjak v. Better Built Homes, Inc., 58 Cal.App.2d 720, 725, 137 P.2d 492, 496, hearing denied. No different result will be reached whether the community in the neighborhood of which injurious blasts are set off counts 85 or more homes or whether the distance is 300 yards or less. The proximity of 85 homes would be sufficient to distinguish the situation before us from the blasting in an isolated spot involved in Houghton v. Loma Prieta Lumber Co., supra.

[16] The incorrect finding of plaintiff's sole ownership of the real property involved, whereas concededly he owned it in joint tenancy with his wife might have been material were it not that the recovery had already been reduced by one-half on that ground. The error now can certainly not justify reversal. If it were necessary we might make a finding to conform to the evidence, which would support the final result reached, but we do not consider the matter of sufficient importance to take such action, Porter v. Gibson, 25 Cal.2d 506, 518, 154 P.2d 703, where appellant does

not argue any danger of harm from the irregularity.

[17-20] In a large part of their brief appellants argue various inconsistencies and conflicts in the evidence of the same or different witnesses culminating in the conclusion that the evidence for plaintiff as a whole is so inherently improbable and its falsity so apparent that it should have been disregarded. Although an appellate court may reject specific evidence which is obviously false or inherently improbable, it does not require citation of authority to show that mere conflicts in the evidence, which are solely for the decision of the trier of facts, cannot take the place of inherent improbability or obvious falsity and lead to wholesale rejection of the evidence in favor of one party. Here the evidence as to the time of the blastings by defendants was without conflict; a large number of witnesses testified to the force of the explosions and their deleterious effect on buildings in Rockaway Beach. That some of these witnesses were also bringing separate damage actions for blasting injury against defendant was a natural result of the situation in which the blasting took place; their interest goes at most to the weight of the testimony of such witnesses. Obviously appellants can not show falsity of testimony as to injury to buildings by quoting on appeal excerpts from scientific papers and addresses not put in evidence or discussed below to the effect that the damage caused by blasting is often exaggerated and that cracks in plaster attributed to it are often of other origin. Even regular scientific expert testimony is not entitled to preference over testimony as to facts; the relative weight must be decided by the trier of facts. Rolland v. Porterfield, 183 Cal. 466, 469, 191 P. 913.

[21, 22] The finding that on November 2, 1946 [before the blast] plaintiff's property was of the reasonable value of $5,000 finds competent support in plaintiff's testimony that he figures the valuation of his house at that time in the neighborhood of $5500. Isenberg v. Sherman, 212 Cal. 454, 483, 298 P. 1004, 299 P. 528; 10 Cal.Jur. 1023. Appellant's attack on plaintiff's evidence on the ground of contradictions in his statements as to his cost price go to the weight of this evidence only, of which the trier of facts is the sole judge.

[23, 24] Appellant contends that there is no support for the finding that in consequence of the blasting on November 2, 1946, "the real property of the plaintiff was structurally weakened in its supports" and that, to the contrary, a witness for defendant, Mr. Heiner who inspected the building from the outside after the blasts, testified that it was a very strongly constructed building and that there did not seem to be any sags or anything of that kind in it. It is true that there was no direct evidence as to structural weakening. However, plaintiff testified that after the November 2 blast there were cracks all through the exterior of the house, the stucco outside was buckled, the window sills and frames all knocked out of proportion, the plumbing leaking, barbecue pit and terrace ruined. From such evidence of visible injury an inference can be drawn that also the general structural strength of the building must have suffered. Whether the inference should be drawn in this case was again for the trier of facts. Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868; 10 Cal.Jur. 738, 739. Such inferential evidence can also overcome direct evidence to the contrary. "[I]t is elementary that direct evidence may be disbelieved and contrary circumstantial evidence relied upon to support a verdict or finding." Gray v. Southern Pacific Co., 23 Cal.2d 632, 641, 145 P.2d 561, 566.

[25-27] Appellant further contends that the amount of damage to the property found to be $1,650 is entirely unsupported by the evidence, and that there was evidence that the cracks in the stucco could be patched up for $100. There was also evidence from a plastering contractor called by plaintiff that he had quoted $440 for the radical replastering of the exterior walls and plaintiff testified that it would cost much more to rebuild the barbecue pit than the original costs of building it, which, together with the terrace walls, also found to be cracked, had cost around $450. Moreover damage to the structural support of the house was found for which plaintiff

was entitled to recover independently from the costs of repair required only to make the house serviceable. Harlow v. Standard Improvement Co., 145 Cal. 477, 480, 78 P. 1045. Certainly where there is permanent injury the difference in the market value of the property before and after the injury is a correct measure of damages. Le Brun v. Richards, 210 Cal. 308, 319, 291 P. 825, 72 A.L.R. 336; Perkins v. Blauth, 163 Cal. 782, 792, 127 P. 50. Plaintiff testified to a difference in market value of $2,000. Under these circumstances we cannot disturb a finding as to the amount of damages which is mainly within the province of the trier of facts.

[28-30] Appellant complains that the court found that plaintiff suffered distress in body and mind, physical pain and mental anguish and discomfort, annoyance, freight and shock to his damage in the sum of $1,000 by reason of the blastings both on November 2, 1946, and February 3, 1947, although at the time of the latter blasting plaintiff was concededly not at home; he only saw the destruction and heard of the danger caused by a falling rock when he came home a few minutes later. (At the first blast plaintiff was thrown from a ladder.) Appellant contends that with respect to the blasting of February 3, 1947, allowing such damages contravenes the rule expressed in Cook v. Maier, 33 Cal. App.2d 581, 584, 92 P.2d 434, 436, that to recover for physical injuries as the result of freight and nervous shock without bodily contact "The fright must be accompanied by fear of immediate personal injury, and physical injury must occur." That case, which involves fright caused by one isolated negligent collision in plaintiff's immediate proximity is not in point here where the distress and fright were caused by repeated blastings which injured plaintiff's real property and disturbed its comfortable enjoyment both by their immediate impact and by the reasonable fear of future danger. The recovery for such invasion of his rights in the real property to which the owner-occupant is entitled includes discomfort and annoyance. Restatement, Torts, § 929(c); Judson v. Los Angeles Suburban Gas Co., 157 Cal. 168, 172, 106 P. 581, 26 L.R.A., N.S., 183, 21 Ann.Cas. 1247; Dauberman v. Grant, 198 Cal. 586, 590, 246 P. 319, 48 A.L.R. 1244; Green v. General Petroleum Corp. 205 Cal. 328, 337, 270 P. 952, 60 A.L.R. 475. Commenting on § 929(c) of the Restatement, supra, reads in part: *"Discomfort and other bodily and mental harms.* Discomfort and annoyance to an occupant of the land and to the members of his household are distinct grounds of compensation for which in ordinary cases the person in possession is allowed to recover in addition to the harm to his proprietary interest." The same rule with respect to nuisances, under the definition of which blasting as here involved comes, § 3479, Civ. Code, is found in 39 Am.Jur. 398; Baltimore & Potomac R. Co. v. Fifth Baptist Church, 108 U.S. 317, 2 S.Ct. 719, 27 L.Ed. 739; United States Smelting Co. v. Sisam, 8 Cir., 191 F. 293, 301, 37 L.R.A., N.S., 976. Among the bodily and mental harms which are compensable must be included continual fear of danger in case of repetition in which persons on the property live. Green v. T. A. Shoemaker & Co., 111 Md. 69, 73 A. 688, 23 L.R.A., N.S., 667. It has even been held that without any actual explosion, storage of explosives in dangerous proximity of a home is a nuisance per se because of the discomfort growing out of the well grounded fear that an explosion may occur, which depreciates the value of the property. Cumberland Torpedo Co. v. Gaines, 201 Ky. 88, 255 S.W. 1046. Plaintiff testified that after the February 3d blast (in which a rock destroyed a bench on the property near which one of his daughters was standing) he could not rest or sleep because of fear for his own security and that of his family. This is a form of discomfort for which plaintiff under the circumstances of this case is entitled to recover, as well as for other discomfort not challenged on appeal. The amount of the recovery for discomfort and annoyance is left to the sound judgment and discretion of the trier of facts without necessity of specific evidence as to such amount. Judson v. Los Angeles Suburban Gas Co. and Green v. General Petroleum Corp, supra.

[31, 32] Appellant next contends that certain findings of blasting in violation of existing county ordinances are unsupported. The somewhat conflicting evidence seems to show that appellant blasted with knowledge and oral consent of the county officials but without written permits as required by the ordinances. We need not decide the effect of these informalities, as in the view we have taken of the liability for blasting the correctness of the judgment does not depend on violation of the ordinances. The findings in that regard are therefore immaterial and may be disregarded as surplusage. Sands v. Eagle Oil & Refining Co., 83 Cal.App.2d 312, 321, 188 P.2d 782, and cases there cited. For the same reason the support of a finding with respect to the situation of the vein of rock, part of which appellant quarries, which finding is characterized in appellant's brief itself as immaterial—and correctly so—does not require discussion. Appellant also attacks a finding to the effect that by the blasting on February 3, 1947, a three pound rock from the quarry was thrown on plaintiff's property, destroying a bench. It is said that the finding is inherently impossible, because there was evidence that the oxidation of the rock showed that it was not freshly blasted from the depth of the quarry but had been exposed to the weather for several years, that such stones were not left on the surface of a quarry worked many times with dozers and caterpillars, and moreover, that a blast as there performed would not throw a stone of that weight so far. However, a daughter of appellant testified that the stone fell and destroyed the bench simultaneously with the blast, a circumstance tending to show causation by the explosion. The conflict was to be determined by the trial court. Rolland v. Porterfield, supra; McGrath v. Basich Brothers Const. Co., 7 Cal.App.2d 573, supra, at page 575, 46 P.2d 981, at page 982.

[33] Appellant also assigns errors in the admission of evidence too numerous to discuss each separately. It may be pointed out however that evidence as to fright and distress caused to plaintiff's children, members of his household, was admissible where damage to plaintiff from that cause was expressly pleaded and was recoverable by plaintiff under authorities cited supra. Restatement, Torts, § 929, commenting; 39 Am.Jur. 398; United States Smelting Co. v. Sisam, 8 Cir., 191 F. 293, 301, 37 L.R.A., N.S., 976. For more cases and for others supporting a contrary minority view see Annotation 142 A.L.R. at p. 1313. For the rest it will suffice to state that a study of the complete record has convinced us that in every instance in which admission of evidence is assigned as error it was either not erroneous or not prejudicial.

The appeal of the appellants Horace Hill and Jack Floyd is dismissed and the judgment affirmed.

GOODELL and DOOLING, JJ., concur.

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95 Cal.App.2d 795

RANDALL et al. v. WOLFF et al.

No. 14128.

District Court of Appeal, First District,
Division 1, California.
Jan. 31, 1950.

Action by William Randall and another against Harry K. Wolff and others, as and constituting the Civil Service Commission of the City and County of San Francisco, and another, for a declaratory judgment that plaintiffs were entitled to the rate of pay received by bricklayers in private employment in the municipality.

The Superior Court in and for the City and County of San Francisco, Thomas M. Foley, J., entered a judgment granting a peremptory writ of mandate, and defendants appealed.

The District Court of Appeal, Ward, J., held that plaintiffs, though having the civil service rating of pavers, were performing bricklayers' work and hence were entitled under city and county charter to the rate of pay generally prevailing for such craft in private employment in San Francisco pursuant to collective bargaining agreements.

Judgment, as modified in accordance with opinion, affirmed.

1. Appeal and error ⟹901

Absence of any claim that error was directly based upon order of trial court on motion for nonsuit was deemed a waiver of that point, since it is not incumbent upon appellate court to search the record for errors.

2. Municipal corporations ⟹220(2)

Evidence sustained finding that employees of City and County of San Francisco having a civil service rating of pavers were performing bricklayers' work within meaning of collective bargaining agreements establishing rate of pay for such craft in private employment in the city and county and hence were entitled under city and county charter to the same rate of pay. St. 1947, p. 3266, § 151.3.

3. Municipal corporations ⟹220(2)

While the test for determining rate of pay to which employees of City and County of San Francisco doing bricklayers' work were entitled under city and county charter was collective bargaining agreements fixing the rate of pay for the same craft in private employment in San Francisco, evidence that in no place in the United States except San Francisco are employees doing the work of pavers paid less than bricklayers was a circumstance tending to show custom and the reasonableness of collective bargaining agreements effective in San Francisco. St. 1947, p. 3266, § 151.3.

4. Stipulations ⟹14(10)

In action for declaratory judgment that city and county employees were entitled under city and county charter to the rate of pay fixed by collective bargaining agreements for bricklayers in private employment, stipulation that pertinent portions of such agreements were correct was equivalent to a failure to deny specific allegations of petition on the subject so that failure to introduce such agreements in evidence at trial was immaterial. St. 1947, p. 3266, § 151.3.

5. Municipal corporations ⟹220(2)

The Civil Service Commission of City and County of San Francisco could not defeat the decision of electors by amendment of city and county charter that municipal employees should receive the rate of pay generally prevailing for the same craft in private employment in San Francisco pursuant to collective bargaining agreements by fixing an employee's salary by a method contrary to that used in private employment. St. 1931, p. 3060, § 141; St. 1946, 1st Ex.Sess., p. 234, § 148; St. 1947, p. 3266, § 151.3.

6. Municipal corporations ⟹220(2)

Under charter of City and County of San Francisco, providing that municipal employees should receive the rate of pay generally prevailing for the same craft in private employment in San Francisco pursuant to collective bargaining agreements, the rate of pay must be fixed in accordance with the work performed and not by the appellation given to a certain job by civil service commission and reclassification of municipal employees having a civil service rating of pavers but doing the work of bricklayers was unnecessary to entitle them to receive prevailing rate of pay for bricklayers. St. 1931, p. 3060, § 141; St. 1946, 1st Ex.Sess., p. 234, § 148; St. 1947, p. 3266, § 151.3.

7. Declaratory judgment ⟹369, 390

Where municipal employees regardless of classification were entitled under city and county charter to the prevailing rate of pay for the same craft in private employment in the municipality, all references in findings, conclusions of law and judgment which might be construed as an order for reclassification of such employees would be deemed stricken. Code Civ.Proc. § 956a; St. 1931, p. 3060, § 141; St. 1946, 1st Ex. Sess., p. 234, § 148; St. 1947, p. 3266, § 151.3.

8. Appeal and error ⟹1152

Where provision of charter of City and County of San Francisco that municipal employees receive the rate of pay generally prevailing for the same craft in private employment in the municipality pursuant to collective bargaining agreements justified order that plaintiffs be paid the same compensation as bricklayers in private employment, any statement in findings, conclusions of law and judgment indicating that such order was based upon another section of charter would be ordered eliminated. Code Civ.Proc. § 956a; St. 1931, p. 3066, § 151; St. 1947, p. 3266, § 151.3.

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Dion R. Holm, City Attorney, City and County of San Francisco, Bernard J. Ward, Jr., Deputy City Attorney, City and County of San Francisco, San Francisco, Attorneys for Appellants.

Worthington, Park & Worthington, San Francisco, Attorney for Respondents.

WARD, Justice.

This is an appeal by the City and County of San Francisco and the members of the Civil Service Commission of San Francisco, as and constituting that body, from the issuance of a peremptory writ of mandate directing that plaintiffs be given the rate of pay received by bricklayers in private employment on the basis that they have been and are doing the same work as bricklayers in private industry and, under provisions of the San Francisco Charter, see §§ 151 and 151.3, St. 1931, p. 3066, St. 1947, pp. 233, 3266, are entitled to the same rate of pay.

The amended petition alleges "That during all of said times Section 151 of the Freeholders Charter of the City and County of San Francisco provided that compensation for municipal employees shall be fixed in accord with the generally prevailing rates of wages for like service and working conditions in private employment." The petition further alleges that in 1945 the voters adopted an amendment by the addition to the charter of section 151.3, which was subsequently ratified by the Legislature; that in 1946 section 151.3 was further amended and likewise ratified by the Legislature, so that the section now reads, in the parts pertinent to the question involved, as follows: "Notwithstanding any of the provisions of section 151 or any other provisions of this charter, whenever any groups or crafts establish a rate of pay for such groups or crafts through collective bargaining agreements with employers employing such groups or crafts, and such rate is recognized and paid throughout the industry and the establishments employing such groups or crafts in San Francisco, and the civil service commission shall certify that such rate is generally prevailing for such groups or crafts in private employment in San Francisco pursuant to collective bargaining agreements, the board of supervisors shall have the power and it shall be its duty to fix such rate of pay as compensations for such groups and crafts engaged in the city and county service."

It is also alleged in the amended petition: "That during all of the times herein mentioned, Petitioners were employees of the City and County of San Francisco, State of California, having a Civil Service rating of Pavers (0264). That the duties regularly required of and performed by Petitioners and each of them in the City and County service as aforesaid and during all of said times consisted of laying brick and paving blocks in and upon the streets, walls, structures and other properties belonging to the City and County of San Francisco, laying cobblestones, raising manholes, basalt work, and in general other duties normally required of a Bricklayer (A 56) which included repair work on walls, constructing arches and the general bricklaying work. * * * That during all of said times and in particular for two years prior to July 1, 1947, Petitioners and Plaintiffs, and each of them, were paid wages of Ten and 30/100 ($10.30) Dollars per day, for a five day week, for such work. * * * That the Bricklayers, Masons, and Plasterers' International Union of America is an association of trades unions of comparable unions throughout the United States organized October 17, 1865, with its headquarters in Washington, D. C. The San Francisco Bricklayers, Stone Masons and Mosaic Terrazzo Mechanics Local Union #7 is a trades union affiliate of the former union, having headquarters in San Francisco, California. That both of said unions were in existence during all of the times herein-mentioned and the Petitioners and Plaintiffs and each of them were members of the San Francisco Union #7. That for a number of years last past, Union #7 has engaged in collective bargaining with various employers and groups of employers in San Francisco and has secured from said employers the recognition of and payment of certain classifications and specified rates of pay for its members and has entered into and executed collective bargaining agreements with said employers pursuant to which said rates of pay and classifications were and are established. That during all of said times Petitioners and Plaintiffs, and each of them, were classified as Bricklayers by said Local Union #7 and accepted into membership of said union as bricklayers." The petition further alleges certain differentials in pay as due plaintiffs covering specified periods.

The prayer of the petition is to the effect that the court render judgment by way of declaratory relief decreeing that plaintiffs "are entitled to the rates of pay as referred to in this complaint and petition," and that the action of defendants as alleged is in violation of section 151.3 of the San Francisco Charter.

In the answer and return to the petition defendants allege that plaintiffs are paid in accordance with the provisions of section 151 of the charter; that the classification by the civil service commission of plaintiffs as pavers is definite and controlling so far as the issues raised herein are concerned; that the alleged collective bargaining agreements are not binding upon defendants, as the condition prerequisite to the adoption of a rate of pay under section 151.3 has not been established throughout the industry by such employing group. Finally, it is alleged by defendants that section 151.3 is unconstitutional in that it places in the hands of private employees and employers the right to determine matters that may be determined only by a governmental legislative body. The vital contention of defendants, as gleaned from the pleadings, is that the collective bargaining agreements referred to by plaintiffs in this action relate to the craft of bricklayers and not to that of pavers.

The evidence shows that plaintiffs, William Randall and Hugh McGill, entered the city service over thirteen years ago by qualifying under a civil service examination for "Pavers" to lay and repair city streets which then were paved with vitrified paving bricks, basalt blocks and wooden blocks. At the time of trial it appeared that plaintiffs were the only employees, either in city or private employment, who were either classified or known as "Pavers." Since July 1, 1947, plaintiffs have received $12.80 a day for a five-day week; since November 11, 1946, bricklayers in private industry have received $2.25 per hour for a six-hour day, with double pay for overtime, based on a five-day week; and from July 1, 1947, bricklayers in the city service have received a daily wage of $18.00 per day. It was stipulated that there are in existence collective bargaining agreements between the Masons' and Builders' Association of California and the local bricklayers' union in accordance with the terms as set forth in the evidence.

The secretary-treasurer of the bricklayers' union, Mr. J. S. Mazza, testified that he was familiar with the type of work performed by plaintiffs and that plaintiffs were able to perform all the functions of bricklayers. The transcript shows his testimony as follows:

"Q. Have you seen the kind of work that they have performed? A. Yes.

"Q. What type of work is it? A. They have been repairing pavings, paving on brick streets; built retaining walls out of * * * what we call basalt blocks, * * which is the hollow type, which they were using in building construction as well as used in building fences around homes, and so forth. * * * But besides that, the basalt block that they used to use in paving, they have built walls with that and also with the other hollow type of block.

"Q. Does that work come within the jurisdiction of your Union? A. Emphatically yes, throughout the United States and Canada.

"Q. What is the title of the employee who does that particular type of work? A. The only titles that we have * * * in our organization, the only distinction that there is between titles in our organization is, we have a bricklayer who serves his time, and in serving his time he is instructed to perform all types of masonry, from brick, stone, terra cotta, tile, and everything else.

"Q. And that includes basalt? A. That includes everything.

"Q. Now, is that the type of work which was performed by the petitioners, to your knowledge? A. Yes, that is correct.

"Q. Are they members of your local union? A. Yes, they are. * * *

"Q. Mr. Mazza, throughout the United States are you familiar with the work which is performed by the bricklayers and bricklayers' Unions? A. Yes.

"Q. To your knowledge is there any governmental agency, or state agency, or municipality, or private employer, who hires men to do the type of work which Mr. Randall or Mr. McGill are doing, without hiring bricklayers? A. No, they hire bricklayers.

"Q. Is there any instance that has come to your attention in the last, we will say, five years, where bricklayers are not required, and not used on jobs employing the same type of work? * * * A. Exclusive of the City and these two particular men, the work has been done by bricklayers.

"Q. In other words, in the City and County of San Francisco and these two men, that is the only exception that you know of in the United States? A. That is correct.

"Q. And when WPA did the paving at the beach and built walls, were bricklayers employed there? A. Yes, sir. * * *

"Q. In the standard of bricklayers which are sent out from your Union, is there any difference in the degree of skill possessed by bricklayers of your Union, from that possessed by Mr. Randall or Mr. McGill? A. None.

"Q. Is there any difference in the type of equipment or tools which Mr. Randall or Mr. McGill use in their City jobs, from those used by bricklayers that you send out? A. They use the same tools.

"Q. Do they use the same type of mortar and filler in their job? A. Absolutely the same."

In response to questioning similar to the foregoing, a masonry contractor, a member of the board of arbitration of the Masons' and Builders' Association of California, testified as follows: "When we figure a paving job, we figure to do the job with bricklayers. This job in the Civic Center is classed as a paving job, and in our terms, in masonry terms, that is a paving job, and we figure to do the job with bricklayers." It is interesting to note that the secretary of the civil service commission, also an honorary member of the bricklayers' union, who testified that in a general way he was familiar with the classification made by the state, federal and municipal governments, was not permitted to answer, by reason of an objection by the defendants, the following question: "Let me ask you this * * *: Do you know of any city, municipality or state, or instance, in the last five years, including the Federal government, where a paver was designated and has been employed by any such agency to do the laying of vitrified brick, or building of brick walls?"

[1] At the conclusion of the presentation of plaintiffs' case on May 21, 1948, the defendants made a motion for a nonsuit based upon the interpretation of section 151.3 of the charter. After argument the motion was ordered submitted by the court. The grounds of the motion are not sufficiently definite and the following minute order dated September 30, 1948, appears in the record: "In this action, heretofore submitted, the Court ordered Motion for Nonsuit partially granted and a judgment entered in favor of Plaintiffs from March, 1947." It is not incumbent upon an appellate court to search the record for errors (People v. Chapman, 81 Cal.App.2d 857, 185 P.2d 424; Euclid Candy Co. of California v. International Longshoremen & Warehousemen's Union, 49 Cal.App.2d 137, 121 P.2d 91; In re Bauer's Trust, 17 Cal.App.2d 426, 62 P.2d 150 and the absence of any claim that error is directly based upon the order in reference to nonsuit is deemed a waiver of that particular point, 2 Cal.Jur. 727, Appeal and Error, § 419; Rauer's Law & Collection Co. v. Gilleran, 138 Cal. 352, 71 P. 445; Black Rock Placer Mining Dist.

v. Summit Water & Irr. Co., 56 Cal.App.2d 513, 133 P.2d 58.

The court found "That Plaintiffs and Petitioners are entitled to a Writ of Mandate directing Respondents and Defendants to pay Petitioners and Plaintiffs the same salary which is being paid to persons classified as Bricklayers (A 56) in the employ of the City and County of San Francisco * * * that while it is true that Plaintiffs and Petitioners were paid the rate of pay established by the Board of Supervisors in the annual salary ordinance per their classification the action of the Defendants and Respondents, Civil Service Commissioners of the City and County of San Francisco, in submitting to the Board of Supervisors the improper and inadequate rate of pay for Plaintiffs and Petitioners as alleged in Paragraph VI of Defendants' and Respondents' Answer and upon which the Board of Supervisors approved its annual salary ordinance were arbitrary and in abuse of their discretion and were in direct violation of the provisions of Sections 151 and 151.3 of the Freeholder's Charter of the City and County of San Francisco." Thereupon judgment was entered and a peremptory writ of mandamus issued. Defendants appealed from the judgment.

[2-4] The basic finding that plaintiffs are performing bricklayers' work, as set forth in the bargaining agreements between the employer and employee, is amply supported by the evidence, as appears from the foregoing narration including the quotations from the reporter's transcript. The test for the particular groups or crafts involved in the present proceeding is collective bargaining agreements fixing the rate of pay in San Francisco, but evidence revealing that in no place in the United States except the municipal government of San Francisco are employees doing the work of "pavers" paid less than bricklayers is a circumstance tending to show custom and the reasonableness of the collective bargaining agreements considered in this proceeding. The defendants call attention to the fact that on the trial the collective bargaining agreements were not introduced into evidence but only marked for identification. However, the pertinent portions of the agreements were stipulated to be correct, which is the equivalent of a failure to deny the specific allegation of plaintiffs' petition on this subject. See: 23 Cal.Jur. 826, Stipulations, § 12; Sun-Maid Raisin Growers of California v. Jones, 96 Cal.App. 650, 274 P. 557; Michelin Tire Co. of California v. Coleman & Bentel Co., 179 Cal. 598, 178 P. 507.

Defendants claim that it is difficult to ascertain from the findings and conclusions whether the trial court relied upon section 151 or section 151.3 in issuing the judgment. There may be some merit to this contention. The method of ascertaining the rate of pay of an employee is not the same under each section. However, the basis of the judgment is charter section 151.3. Hereinafter an order will be made covering this point.

[5, 6] It is contended by defendants that the effect of the judgment will force a reclassification of the plaintiffs' positions in the city and county service. The civil service commission is permitted to classify and reclassify in accordance with duties and responsibilities "all places of employment in the departments and offices of the city and county not specifically exempted by this charter from * * * civil service provisions thereof", charter § 141, St. 1931, p. 3060, and has the right to submit to the appointing officer the name and address of the highest eligible to fill a vacancy, charter § 148, as amended, St. 1947, p. 234. The sections relied upon by defendants refer to classification and not to rate of pay. The civil service commission may not defeat the recent decision of the electors of the city and county in establishing a "Basis of Standardization of Compensation of Certain Employees", § 151.3, by fixing an employee's salary by a method contrary to that used in private employment. Classification does not control "rate of pay" to the exclusion of all other considerations. Section 151.3 provides that "Notwithstanding any of the provisions of section 151 or any other provisions of this charter," when a collective bargaining agreement is entered into between employers and employees and the rate of pay is recognized and paid throughout the industry and the establishments employing such groups or crafts in San Fran-

cisco, the civil service commission shall certify that such rate is generally prevailing for such groups or crafts in private employment in San Francisco pursuant to collective bargaining agreements, and it shall be the duty of the board of supervisors to fix such rate of pay as compensation for such groups and crafts engaged in the city and county service. The section also provides that the civil service commission shall review all such agreements at certain periods each year and certify to the board of supervisors any proposed modifications in the "rates of pay" in accordance with changed conditions or provisions as they appear in the collective bargaining agreements applicable solely to San Francisco as far as the present group or craft is concerned. There is no provision in section 151.3 requiring consideration of classification in determining the "rate of pay." It was not necessary that the trial court make any order with reference to classification. Neither by the allegations nor the prayer of the amended petition is a reclassification sought. It was so stated during the presentation of the evidence. It has been repeated on appeal. The rate of pay must be fixed in accordance with the work performed and not by the appellation given to a certain job by the civil service commission. In Adams v. Wolff, 84 Cal.App.2d 435, at page 444, 190 P.2d 665, at page 671 this court stated: "It is quite apparent that it was the intent of § 151.3 to give to the public employees of the type here involved the same take home pay received by private employees in the same industry"; also, 84 Cal.App.2d at page 443, 190 P.2d at page 671, "By that section the people have set up a standard for determining rates of pay that will insure these public employees a wage scale commensurate with wages received by workers in the same field in private industry."

Among the separate defenses filed in the answer there is raised the issue of the constitutionality of section 151.3. The point is not stressed in the briefs and has been decided in Adams v. Wolff, supra, contrary to defendants' views therein.

[7] In view of an affirmance herein of the judgment as pertaining to the order of the trial court directing defendants to pay plaintiffs the same salary being paid to bricklayers together with specified sums representing the differential due them in wages, it hereby is ordered that, under the provisions of section 956a of the Code of Civil Procedure, all reference in the findings, conclusions of law and the judgment which might be construed as an order for reclassification is to be deemed stricken therefrom.

[8] Based on the identical ground and under the same authority last stated, it hereby is ordered that any statement in the findings, conclusions of law and judgment indicating that the action of the court was based upon section 151 of the charter is eliminated from such document or documents.

Solely upon the ground that the civil service commission violated section 151.3 of the charter, the judgment of the superior court granting a peremptory writ of mandate, as herein modified, is affirmed.

PETERS, P. J., and BRAY, J., concur.

NUNNELEY v. EDGAR HOTEL et al.

Civ. 3895.

District Court of Appeal, Fourth District, California.

Feb. 2, 1950.

Rehearing Denied Feb. 28, 1950.

Hearing Granted April 3, 1950.*

Golda J. Nunneley sued Edgar Hotel, Gladys Peterson Brickel, Charles F. Brickel, and others to recover for injuries sustained in falling through a shaft on a hotel roof used for ventilation and light.

The Superior Court of Orange County, Franklin G. West, J., rendered judgment for the plaintiff, and defendants appealed.

The District Court of Appeal, Griffin, J., held that an instruction relating to violation of the statute requiring a parapet around a "vent shaft" was reversible error where the question as to whether the shaft through which plaintiff fell was a vent shaft within the meaning of the statute was not submitted to the jury, and that permitting the jury to view the scene of the accident was not an abuse of discretion.

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* Subsequent opinion 225 P.2d 497.

Judgment reversed.

1. Health 🔑32

Section 16827, requiring a vent shaft to be surrounded by a parapet at least 30 inches in height from the floor of roof, applies only to a "vent shaft" as defined in section 15029, and no such parapet is required to surround a "light well" or "shaft" as defined in section 15029. Health and Safety Code, §§ 15029, 16827.

2. Appeal and error 🔑1064(1)
Innkeepers 🔑10.8

In action by hotel guest against owners of hotel to recover for injuries sustained in falling through a shaft on hotel roof used for ventilation and light, instruction that construction and violation of statute requiring parapet 30 inches in height at roof line of every shaft constituted negligence per se, was reversible error, where jury had no opportunity to determine whether shaft involved was a "vent shaft" within the meaning of the statute. Health and Safety Code, §§ 15029, 16827.

3. Trial 🔑194(4)

Where defendant hotel owners denied generally all allegations contained in hotel guest's count alleging that she fell through a vent shaft maintained contrary to statute and also denied violation of any statute in reference thereto, such denial did not amount to an admission that shaft under consideration was a "vent shaft" within statute requiring such a shaft to be surrounded by a parapet of a certain height so as to authorize instruction that violation of statute constituted negligence per se. Health and Safety Code, §§ 15029, 16827.

4. Trial 🔑330(5)

A general verdict imports findings in favor of prevailing party on all material issues, and if there is substantial evidence to support a verdict on one count, which is unaffected by error in an instruction given as to another count, a judgment on count thus unaffected by error will not be reversed.

5. Pleading 🔑369(3)

A party may set forth same cause of action in varied and inconsistent counts and may not be compelled to elect between them, so that negligence may be charged in separate counts as occurring in as many ways as plaintiff believes his evidence will show.

6. Appeal and error 🔑1064(1)

Where hotel guest seeking to recover injuries sustained in falling through a shaft on hotel roof used for ventilation and light alleged general negligence against hotel owners in first count and in second count alleged violation of statute requiring parapet of certain height to be maintained around a vent shaft, erroneous instruction with respect to applicability of statute relied on in second count required reversal of judgment for plaintiff. Health and Safety Code, §§ 15029, 16827.

7. Trial 🔑28(2)

In action by hotel guest against owners of hotel to recover for injuries sustained in falling through a shaft on hotel roof used for ventilation and light, permitting jury to view scene of accident under instruction that fact that changes had been made was not to be considered by jury for any purpose was not an abuse of discretion. Code Civ.Proc. § 610.

◆

Forgy, Reinhaus & Forgy, Santa Ana, for appellants.

Harvey, Rimel & Johnston, Santa Ana, for respondent.

GRIFFIN, Justice.

Defendants appeal from a judgment based upon a jury verdict in favor of plaintiff for $10,000. Plaintiff's complaint seeks damages for personal injuries resulting to her from a fall into an opening termed by the plaintiff a "vent shaft" of the Edgar Hotel, in Santa Ana, which hotel was owned and operated by defendant Gladys Peterson Brickel. Defendant Charles F.

Brickel, her husband, was manager. In the first claimed cause of action or count plaintiff alleges general negligence of defendants, i. e., that there was no sign or warning of the dangerous or hazardous condition of the area on the roof; that there were no lights; that a mattress was placed on a parapet surrounding a vent shaft by defendants; that judging from *"the height of the parapet"* said mattress appeared from the doorway to be resting on a solid foundation; that this condition constituted a dangerous and hazardous condition of which defendants were aware; and as a result of which plaintiff sat upon it and fell down the shaft. In a claimed second count or cause of action she alleges that the opening, termed by her a "vent shaft", was maintained contrary to the provisions of section 16827 of the Health and Safety Code in this, that it was surrounded by a parapet less than 30 inches in height. The hotel was built in 1913-1914, as a three-story building, with a penthouse on the roof. The various photographs which were introduced in evidence show the roof, penthouse, the shaft, and the parapet surrounding the shaft. In the afternoon of August 25, 1946, plaintiff, after visiting two bars, went with Marine Sergeant Robinson and Marine Sergeant Stevens, whom she had met at a bar, to one of the rooms in the penthouse of the Edgar Hotel. Plaintiff stepped out of the hallway of the penthouse onto the roof of the building in company with Robinson. After walking around the roof, she came to the opening on the roof, termed a vent shaft. Over the end of this shaft a mattress had been partially stretched. The parapet at that point was 27 inches high. The shaft was 68 inches wide. The mattress was 72 inches long. As plaintiff approached the shaft she stated: "Here is a sack" (Marine's term for a bed), "I think I will sit on it." She sat on it and fell two stories and sustained serious injuries. The so-called "vent shaft", throughout the trial, was interchangeably used with the words "light well". It was approximately 30 feet long and was surrounded by a wall or parapet which varied in height, due to the slope of the roof. At its highest point it extended about 42 inches above the roof. The evidence shows that the plaintiff, accompanied by the two sergeants, went to the hotel about 8 o'clock in the evening, obtained the key from the lady on duty, and went upstairs. The men had registered at the hotel that afternoon and were given separate rooms in the penthouse. Their testimony is that the lights in the hallway were not bright and they saw no signs on the walls as they came up the stairway. All had one drink apiece in the sergeant's room, which they did not finish. There were no lights on the roof except that from the street lights and a miniature golf course across the street. Sergeant Robinson stated that from where he was standing on the roof the object, which he later discovered was a vent shaft, "looked like a flat top or another little roof like a little house"; that no lights could be seen coming from the shaft and the mattress appeared to be lying flat on a little roof; that a little light came from the hallway; that the doorway of the penthouse onto the roof was wide open and it was only necessary to step over a little ledge to step upon the roof. He stated that although they had had several drinks, none of the party were intoxicated. Three police officers who investigated the accident testified that they saw no signs of any kind relating to keeping off of the roof, although defendants produced signs which they claim were posted in conspicuous places leading to the roof. They also introduced in evidence "Hotel Rules" cards, which were on display in the several rooms, at the bottom of which there was typewritten: "Stay off roof * * * No guests or persons allowed on roof of hotel."

Defendant Charles F. Brickel testified that as manager of the hotel he took the mattress out onto the roof prior to this occasion but that he placed it upon a springs of an old bed that was near by and that he had no knowledge of it being placed in the position which it was claimed to have been found by the plaintiff. After the court instructed the jury, it returned a verdict in favor of plaintiff, as indicated.

No question is raised as to the amount of the verdict being supported by the evidence of the injuries received.

The first point raised on appeal and which appears to be most serious, surrounds the giving of two instructions requested by plaintiff. Instruction 15 reads: "Health and Safety Code, 16827. Parapet or rail at roof line. 'A parapet or rail at least thirty inches in height shall be constructed at the roof line of every vent shaft in an apartment house or hotel so that no person may walk or fall into the shaft.' Conduct which is in violation of Section 16827 just read to you constitutes negligence *per se*." And Instruction No. 30 provides: "If you find that defendant Gladys Peterson Brickel violated the statute requiring the parapet around the light well to be of minimum height, her negligence is thereby established, but before plaintiff may recover you must further find that the negligence of such defendant was the proximate cause of plaintiff's injury and that plaintiff was not guilty of contributory negligence and that plaintiff was an invitee (or licensee) as to the part of the premises where she was injured."

It is the contention of the defendants that section 16827, supra, is a provision adopted after the erection of the Edgar Hotel and that it appears that it is a provision which was not intended to apply retroactively to the shaft in that hotel. Defendants do not concede that the shaft is a "vent shaft", within the meaning of section 15029 of the Health and Safety Code. They contend that such a shaft as here described was a "light well" and therefore section 16827 has no application to a light well; that since the hotel was erected in 1914, it was then lawful to furnish light and air by means of an open shaft; that there was no requirement that it be surrounded by a parapet 30 inches in height; and that this requirement was first enacted by Stats. 1923, p. 819, chap. 386, sec. 56. In support of this contention defendants cite Watwood v. Fosdick, 212 Cal. 84, 297 P. 881, and Lee v. Dawson, 44 Cal.App.2d 362, 112 P.2d 683.

Defendants also point out that the State Housing Act now in force [Division XIII Health and Safety Code] contains provisions which make it clear that a requirement of a parapet around a vent shaft is not retroactive, citing sections 15154, 16200 to 16204, 16222, and sections 17485 and 17533 thereof. Defendants' conclusion is that from these statutes, this hotel building, which was erected prior to 1923, was not required, under the Health and Safety Code, to have any vent shaft whatsoever, and that there is no requirement therein that a parapet be erected around this type of shaft; that the court went beyond the express language of the statute and invaded the province of the jury when it advised the jury that the maintenance of the property in a certain condition on the date of the accident was negligence *per se;* and that instructions 15 and 30 were not only erroneous but by their very nature were prejudicial.

It is respondent's answer to this contention that the legislative history and statutory wording show that some provisions of successive housing acts apply to existing structures, others to subsequent structures, and still others to all structures, citing Statutes 1913, p. 1429; and Statutes 1917, pp. 1474-1475, chap. 738, sec. 3; that in order to determine whether a certain provision of the code or of the 1923 act applies to buildings erected before 1923, it is necessary to consider the language used, the nature of the act required of the hotel owner, and the evil to be remedied; that the act required the hotel owner, under the section in question, to provide a parapet wall or rail so that no person would walk or fall into such shaft, and to erect it at the height indicated; that compliance therewith would only require a minor addition and would not have to be a structural part of the building; that the law is in the interests of public safety and, as such, should be liberally construed to cope with the hazard to be remedied. In support of this argument plaintiff cites Sheyer v. Lowell, 134 Cal. 357, 66 P. 307; Marr v. Whistler, 49 Cal.App. 364, 193 P. 600; In the Matter of Stoltenberg, 165 Cal. 789, 134 P. 971; and In the Matter of Stoltenberg, 21 Cal.App. 722, 132 P. 841.

The term "vent shaft", as used in the Act, sec. 15029, is defined as "one used solely to ventilate or light a water-closet compartment or bath room". The word "shaft" is also there defined to mean "any shaft used for air, light, or ventilation, or for an elevator or dumb-waiter".

Throughout the trial the shaft herein mentioned, whatever cognomen should be attached to it, was described by all parties as either a "vent shaft" or a "light well" and the case was apparently tried on the theory that it was a shaft used not only for ventilation but for light as well.

[1] Section 16827 of the Health and Safety Code, requiring a "vent shaft" to be surrounded by a parapet at least thirty inches in height from the floor of the roof, applies only to a "vent shaft", as defined in section 15029 of the Health and Safety Code. No provision of the law has been cited requiring such a parapet of such height to surround a "light well" or "shaft", as defined in section 15029, supra.

[2] In giving the instruction complained of, the definition of a "vent shaft", as defined in sec. 15029, supra, was not given, and the jury had no opportunity to determine whether the shaft here involved was or was not a "vent shaft" within the meaning of that section. The physical surroundings and photographs conclusively show that the "shaft" was not "one used solely to ventilate or light a water-closet compartment or bath room." Therefore, under the strict interpretation of the section, that section had no application to the facts here presented and it was error to instruct the jury that "conduct which is in violation of section 16827 just read to you constitutes negligence *per se*", and "If you find that defendant Gladys Peterson Brickel violated the statute requiring the parapet around the *light well* to be of minimum height, her negligence is thereby established * * *."

[3] In support of the instructions, as given, plaintiff satisfies herself with the argument that since defendants, by their failure to deny the allegation that plaintiff fell into a "vent shaft", and since the case was tried upon that theory, the defendants thereby admitted it was a "vent shaft" and were bound by this admission. This does not answer the point. The defendants denied generally all allegations contained in the claimed second count pertaining to the "vent shaft" and denied that defendants violated any law in reference thereto. This would not amount to an admission that the shaft under consideration was a "vent shaft" coming within the provisions of section 16827, supra, particularly where the undisputed evidence shows that it did not. The giving of the instruction was erroneous.

The argument presented in defense of the judgment is that the jury was not prejudiced by the giving of the instructions, even if erroneous, since the evidence fully justified the verdict under the first count alleging general negligence; and because the verdict was a general one it was "immaterial that there may have been error pertaining to one cause of action", and cite such cases as In re Estate of Hellier, 169 Cal. 77, 145 P. 1008; Union Collection Co. v. Oliver, 23 Cal.App. 318, 137 P. 1082; Asamen v. Thompson, 55 Cal.App. 2d 661, 672, 131 P.2d 841; Shields v. Oxnard Harbor District, 46 Cal.App.2d 477, 116 P.2d 121; Hume v. Fresno Irrigation District, 21 Cal.App.2d 348, 69 P.2d 483; Big Three Min. & Mill. Co. v. Hamilton, 157 Cal. 130, 141, 107 P. 301, 137 Am.St. Rep. 118; Brandes v. Rucker-Fuller Desk Co., 102 Cal.App. 221, 282 P. 1009; Oberholzer v. Hubbell, 36 Cal.App. 16, 19, 171 P. 436; Hopping v. City of Redwood City, 14 Cal.App.2d 360, 362, 58 P.2d 379; Mitchell v. Towne, 31 Cal.App.2d 259, 261, 87 P.2d 908; Hoffart v. Southern Pacific Co., 33 Cal.App.2d 591, 602, 92 P.2d 436; and Leoni v. Delany, 83 Cal.App.2d 303, 309, 188 P. 765, 189 P.2d 517.

Defendants cite Panos v. Great Western Packing Co., 21 Cal.2d 636, 134 P.2d 242, in support of their argument that but one cause of action is stated in the complaint, although attempted to be set forth in two separate counts.

[4] We have examined the cases relied upon by respondent in support of her argument. They set forth the rule that a general verdict imports findings in favor of

the prevailing party on all material issues and that if there is substantial evidence to support a verdict on one count, *which is unaffected by error* in an instruction given as to another count, a judgment on the count thus unaffected by the error will not be reversed. The factual situations in the cases cited are distinguishable.

In Kyle v. Craig, 125 Cal. 107, 57 P. 791, it was held that the fact that a cause of action is set up in separate counts, each numbered as a separate paragraph, all the counts may be considered together as a narration of the facts relied upon in recovering, and in Murray v. Murray, 115 Cal. 266, 47 P. 37, 37 L.R.A. 626, 56 Am. St.Rep. 97, it was held that where but one cause of action is stated, the mistaken designation of a portion of a complaint as a separate cause of action should be disregarded as an error which will not affect the substantial rights of the parties.

[5, 6] It is the rule that a party may set forth the same cause of action in varied and inconsistent counts and may not be compelled to elect between them, and negligence may be charged in separate counts as occurring in as many ways as plaintiff believes his evidence will show. Froeming v. Stockton Electric R. Co., 171 Cal. 401, 153 P. 712, Ann.Cas. 1918B, 408; 21 Cal. Jur. p. 64, sec. 39; 19 Cal.Jur. p. 675, sec. 99. However, in the instant case, where the question of the height of the parapet was brought into issue under the first count and also upon the second count, it cannot be said that the determination of the jury on the issues presented under the first count were unaffected by the instruction given. The jury was told, without any distinction as between the first and second counts, that if it found that defendant violated the statute, as read, her negligence *"is thereby established"*. It was problematical whether the jury determined the issues presented, on the claim of general negligence, as indicated by the allegations in the claimed first cause of action, or determined it solely upon the erroneous instruction given. The fact that the jury was taken to the scene and had the opportunity to see and measure for themselves the parapet previously constructed, adds to the confusion and uncertainty. We conclude that prejudicial error resulted. Fisher v. Los Angeles Pacific Co., 21 Cal.App. 677, 132 P. 767.

Since we have held that it was error to give the instructions complained of in reference to the parapet, it becomes unnecessary to determine whether or not section 16827, supra, applied to buildings erected prior to the date of its enactment.

The next claim is that the court erred in permitting the jury to view the premises where the accident occurred. Between the time the accident took place in 1946, and the time of trial in 1948, defendants had placed additional guard rails above the parapet then existing, which were 2½ to 3 feet in height. During the trial, plaintiff, in the presence of the jury, requested that the jury inspect the premises. Counsel for defendants objected by reason of the fact that changes had been made. Subsequent discussion was had thereon out of the hearing of the jury. By stipulation the trial judge viewed the premises, returned to court and announced that he was inclined to allow the jury also to view them. A stipulation was entered into that at the scene, the court may instruct the jury to disregard the change, reserving to the defendants all general objections. The jury was taken to the scene of the accident and instructed that "The fact that any changes have been made does not mean that there is any intimation upon the part of the defendants or any of them, that the condition was dangerous at the time of the accident, nor to be considered by you for any purpose whatsoever * * *."

[7] Section 610 of the Code of Civil Procedure provides that when, in the opinion of the court, it is proper for the jury to have a view of the place in which any material facts occur, it may order them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While changes in the condition of the property might render the view of the jury less satisfactory in applying the testimony, such change could not affect the discretionary power of the court to allow such view. Osgood v.

City of Chicago, 154 Ill. 194, 41 N.E. 40; Spurrier Lumber Co. v. Dodson, 30 Okl. 412, 120 P. 934; People v. Pompa, 192 Cal. 412, 422, 221 P. 198; Shields v. Oxnard Harbor District, supra.

In National Box Co. v. Bradley, 171 Miss. 15, 157 So. 91, 94, 95 A.L.R. 1500, the court stated the proper rules of practice in regard to requests for views, and said: "* * * when such a request is made improperly in the presence of the jury * * * the judge should, of his own motion, retire the jury, and if he do not, the opposite party must request the retirement * * * the objecting party must (1) make the request for the retirement of the jury, and (2) he must object to the view. * * * Until the objecting party has requested the retirement of the jury, any previous failures to conform to the rules of practice above stated will be considered as breaches of propriety but not as reversible error."

In a new trial the jury should be properly instructed on the law applicable.

Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.

96 Cal.App.2d 28

MOORE v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 14159.

District Court of Appeal, First District, Division 2, California.

Feb. 9, 1950.

Hearing Denied March 30, 1950.

Petition by John C. Moore against the Board of Education of the City and County of San Francisco and others, for a writ of mandate to compel respondents to pay a stated sum alleged due under a contract.

The Superior Court in and for the City and County of San Francisco, Milton D. Sapiro, J., rendered a judgment for respondents, and petitioner appealed.

The District Court of Appeal, Dooling, J., held that the petition showed that respondents promised to pay nothing.

Judgment affirmed.

Mandamus ⚷154(4)

Petition for writ of mandate to compel board of education and others to pay stated sum alleged due for services performed under contract allegedly evidenced by letter reciting that entire amount was to be raised by private means without cost or obligation on part of board, by a committee to be subsequently appointed, disclosed no promise on part of respondents and stated no ground for relief sought.

John C. Moore, San Francisco, in pro. per.

Dion R. Holm, City Attorney, San Francisco, Irving G. Breyer, San Francisco, of counsel, for respondent.

DOOLING, Justice.

Appellant petitioned for a writ of mandate to compel respondents to pay him $9,300 alleged to be due for services performed under a contract. The contract is alleged to be evidenced by a letter which contains the following provision: "The entire amount of the bid $9,300 to be raised by private means, without cost or obligation on part of the Board of Education, by a committee to be subsequently appointed."

Apart from any other consideration it appears that respondents promised to pay nothing (except the nominal sum of one dollar in a following sentence) and appellant agreed to look to a voluntary committee later to be formed for his compensation. Respondents' demurrer was therefore properly sustained.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

95 Cal.App.2d 708

KOHN v. KOHN et al.
Civ. 14017.

District Court of Appeal, First District,
Division 2, California.
Jan. 26, 1950.

Rehearing Denied Feb. 25, 1950.
Hearing Denied March 23, 1950.

Doris Kohn sued Marion H. Kohn, also known as Marion H. Kent, and Jacob Barman and others for enforcement of a property settlement agreement which provided that the first named defendant was to pay 30 per cent. of his income for the previous year to the plaintiff wife.

The Superior Court in and for the city and county of San Francisco, Theresa Meikle, J., rendered judgment. The first named defendant appealed, and plaintiff cross-appealed.

The District Court of Appeal, Dooling, J., held that certain receipts of defendant constituted income within meaning of agreement and therefore were subject to payment to plaintiff under the settlement agreement to the extent of 30 per cent.

Judgment reversed in part and affirmed in part.

1. Contracts ⇨143

A contract must be read from its four corners and emphasis should not be given to a particular part of a contract so as to make nugatory another part thereof.

2. Contracts ⇨170(1)

Conduct of parties to contract with respect to interpretation placed on contract will not be ignored in construing contract unless contract is very clear that parties have misconstrued it.

3. Husband and wife ⇨279(1)

Where agreement between divorced husband and wife incorporated in divorce decree provided that husband was to pay 30 per cent of his income for previous year to wife defining income so as to include all gross yearly receipts and also providing that wife assigned to husband all her interest in certain moneys received by him by way of compromise of will contest, income received from funds acquired under compromise of will contest would be considered as "income" within terms of agreement subject to distribution to extent of 30 per cent to wife.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Income".

4. Husband and wife ⇨279(1)

Where agreement between divorced husband and wife incorporated in divorce decree provided that husband was to pay 30 per cent of his income for previous year to wife, profits received by husband from sale of realty under joint venture would be included as income subject to distribution to wife to extent of 30 per cent in view of testimony of joint adventurer that his claim against such profits had been settled.

5. Corporations ⇨150

A distribution of earnings to corporate stockholders however denominated may be treated as dividends where that is their practical effect and justice will be served by so treating them.

6. Husband and wife ⇨281

In action by divorced wife against husband under agreement between parties incorporated in divorce decree requiring that husband pay 30 per cent of his income for previous year to wife, excluding compensation received for personal services, evidence was properly admitted to show that so-called salary paid to husband by corporation of which he owned 50 per cent of stock was in fact a "dividend" within meaning of settlement agreement subject to distribution to wife to extent of 30 per cent.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Dividend".

7. Husband and wife ⇨281

In action by divorced wife against husband for an accounting under an agreement between parties incorporated in divorce decree providing that husband was to pay 30 per cent of his income for previous year to wife, filed in 1946 and trial had thereon in 1947, trial court could include in its judgment plaintiff's share of defendant's income for the year 1946 without requirement that plaintiff file a supplemental complaint covering year 1946.

8. Appeal and error ⚷1034

Technical objections are not ground for reversal on appeal unless court can find that an appellant has suffered prejudice.

9. Corporations ⚷1

Although a corporation is usually regarded as an entity, separate from its stockholders, both law and equity will, when necessary to circumvent fraud, protect rights of third persons and accomplish justice, disregard distinct existence and treat them as identical.

10. Corporations ⚷1

Where agreement between divorced husband and wife incorporated in divorce decree provided that husband was to pay 30 per cent of his income for previous year to wife, creation of corporation by husband with co-adventurer to which income producing realty was conveyed for purposes of minimizing payments to wife under settlement agreement would be disregarded and husband's share of income from corporation would be included in computing amount due wife under settlement agreement.

11. Husband and wife ⚷279(1)

Where agreement between divorced husband and wife incorporated in divorce decree provided that husband was to pay 30 per cent of his income for previous year to wife, defining income as gross yearly receipts and cash or its equivalent, use of home by husband, rent free, owned by trust of which husband was beneficiary constituted income within meaning of settlement agreement to extent of rental value of house.

12. Husband and wife ⚷279(1)

Under agreement between divorced husband and wife incorporated in divorce decree which provided that husband was to pay 30 per cent of his income for previous year to wife including any profit realized by capital sales, wife would be entitled to share of profit realized from sale of realty to which right to property itself had been released.

◆

Philip S. Ehrlich, Albert A. Axelrod, R. J. Hecht, San Francisco, for appellant.

Erskine, Erskine & Tulley, Morse Erskine, San Francisco, Gavin McNab, Schmulowitz, Aikins, Wyman & Sommer, Nat Schmulowitz, Peter S. Sommer, Sidney DeGoff, San Francisco, for respondent.

DOOLING, Justice.

Doris and Marion Kohn were married in 1927, separated in 1941, and in 1942 executed a property settlement agreement which was incorporated into the interlocutory decree of divorce obtained in the same year. The agreement was also made a part of the final decree of divorce in 1944.

This action was tried upon an amended complaint filed November 15, 1946 by Doris (hereafter called plaintiff), for the enforcement of the agreement against Marion (hereafter called defendant), alleging on the basis of information and belief that defendant had misstated his income for the years 1943, 1944 and 1945 and had concealed his true income. She asked in the amended complaint that the agreement be enforced; for an accounting; for judgment in the amount found to be owing her; for an order declaring her right to inspect defendant's accounts in the future; for a restraining order and injunction against altering, concealing or destroying records; for costs; and other relief generally.

The agreement provides that defendant is to pay to plaintiff each year 30% of his net income for the year previous to payment, in 12 monthly instalments. It further settles the property interests of the parties. The pertinent provisions follow.

Paragraph 5 defines "net income" for the purposes of the agreement as "(a) The gross yearly receipts * * * in cash or its equivalent, less the amounts paid * * * as income taxes * * * and without deduction for capital losses (except when realized upon the sale of stocks or bonds) and * * * without the addition or inclusion of capital gains and profits, unless such capital gains and profits be reduced to cash or other liquid form, in which latter event, any profit realized by capital sales or conversions, or otherwise, shall constitute income.

"(b) Provided that the amount to which (plaintiff) shall be entitled monthly (hereunder) shall remain in excess of $350.00, any income derived * * * from rentals of the real property situated in the County of Marin * * * and any income derived * * * as compensation for personal services * * * and any income derived * * * from additional inheritances or from voluntary gifts hereafter made to (defendant) shall not be considered or constitute for the purpose hereof any part of the income * * *.

"(c) In the event, however, that (the amount payable as above defined falls below $350.00, defendant) shall pay * * * from the sums excluded from income in subparagraph (b) * * * such portion thereof not to exceed 30% as, when added to said sum of less than $350.00 monthly, will total not to exceed $600.00 monthly * * *."

Paragraph 11 settles various property interests of the parties. By it plaintiff assigns to defendant all her interest in: "(a) The moneys and property received (by defendant) by way of compromise of the will contest * * * in the Estate of George Kohn * * * and of the claims (of defendant) to share in said estate, and in and to any and all stocks, bonds, securities and other property purchased with any moneys received by way of said compromise and the substitutes for and reimbursements of any and all property purchased with any portion of said moneys received by way of compromise;

"(c) The interest of (defendant) in and to the estate and assets thereof of Eva Heller Kohn, deceased, including all trusts and the properties, real and personal, constituting the corpus thereof, but excepting therefrom any rights of (defendant) to the income from said trusts after the same is paid to (defendant);

"(e) The certain real property situated in the County of Marin * * *."

The court after trial in which, over defendant's objection, transactions for the year 1946 were also inquired into gave judgment for the plaintiff for certain additional amounts based on defendant's income as found by the court for those years. From this judgment both plaintiff and defendant have appealed. We shall consider these appeals separately taking up first

Defendant's Appeal.

The issues presented upon this appeal will be discussed and treated under separate headings.

I. *Was it error to include as income under the agreement, income from the property received by defendant from the estate of George Kohn?*

Defendant and plaintiff are in agreement that plaintiff has no right to any of the property obtained by defendant from the estate of George Kohn, deceased, because plaintiff has relinquished all such claims by paragraph 11(a) of their property settlement agreement. The issue raised here is whether the income derived from that property by defendant is to be included in his "net income" as defined by, and for the purposes of, the property settlement agreement.

Although the above mentioned paragraph 11(a) deals specifically with this property, it says nothing whatsoever about the income from such property, hence it is no help in itself. It is pointed out by defendant that with respect to the estate of Eva Heller Kohn (paragraph 11(c)), plaintiff has relinquished all rights to the corpus, but specifically reserved her interest in the income from the trust. It is argued by defendant that had the intention been to reserve such a right to income in the estate of George Kohn, there would have been a similar specific reservation of income in paragraph 11(a) dealing with that property. It seems quite apparent, however, that neither of these paragraphs is primarily concerned with income, inasmuch as the provisions for income are set out specifically and in detail in paragraph 5. The purpose of paragraph 11 is manifestly to settle property interest as such. Therefore the fact that it seemed advisable to reserve rights to income in relinquishing rights to the corpus of a trust (par. 11(c)) is not convincing that omission of a right to income in relinquishing rights to property to be held by defendant outright is dominantly significant in the construction of the contract.

Good reason for the express reservation of the right to participate in income from the trust appears in the fact that under the trust defendant has no legal title to any part of the corpus of the trust, his principal right being to receive income therefrom, and in the absence of such express reservation plaintiff's assignment to defendant of "the estate and assets * * * of Eva Heller Kohn, including *all trusts* * * *" might well have been construed to include the income from such trust, the right to receive which constituted defendant's principal property right therein. In the case of money and property received from George Kohn's estate defendant had the legal title thereto and the assignment of plaintiff's interest therein would carry no similar implication of a waiver of the right to receive income derived therefrom.

[1] It is a well established rule that a contract must be read from its four corners, and emphasis should not be given to a particular part of a contract so as to make nugatory another part thereof. Civil Code sec. 1641; 6 Cal.Jur. 258 and cases cited therein. To place emphasis upon paragraph 11, in ascertaining the items of income for the purposes of the agreement, would be to ignore the paragraph which, by the very terms of the contract itself, was intended to govern the accounting of income. Such a mode of construction cannot be followed, as it is the duty of the courts to construe a contract according to the manifest intent of the parties. Civil Code secs. 1636–1639; 6 Cal.Jur. 252-255 and cases cited therein.

Paragraph 5, in defining "net income" for the purposes of this contract, is drafted in inclusive terminology, so as to include *all* "gross yearly receipts" unless specifically excepted. There is no provision in paragraph 5 by which the income from the property received from the estate of George Kohn could be excepted.

[2, 3] It further appeared at the trial that the practical construction of the contract by both defendant and plaintiff, and the construction and interpretation by which defendant was guided even after the initiation of this action, and until during the actual progress of the trial counsel for defendant for the first time suggested the construction now contended for, was that the income under discussion here was subject to the claims of plaintiff as income under the agreement. Such conduct will not be ignored unless the contract is very clear that the parties have misconstrued it. As stated in Mitau v. Roddan, 149 Cal. 1, 14, 84 P. 145, 150, 6 L.R.A.,N.S., 275: "It is to be assumed that parties to a contract best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to his own interest, and to insistence on his rights, and that whatever is done by the parties contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be. * * *." See also Barham v. Barham, 33 Cal.2d 416, 423, 202 P.2d 289; Lemm v. Stillwater Land & Cattle Co., 217 Cal. 474, 481, 19 P.2d 785; Woodbine v. Van Horn, 29 Cal.2d 95, 104, 173 P.2d 17; Moore v. Wood, 26 Cal.2d 621, 629, 160 P.2d 772; Roy v. Salisbury, 21 Cal.2d 176, 184, 130 P.2d 706; Tanner v. Title Ins. & Trust Co., 20 Cal.2d 814, 823, 129 P.2d 383; Commercial Discount Co. v. Cowen, 18 Cal.2d 610, 615, 116 P.2d 599; Thew v. Thew, 35 Cal.App.2d 691, 695, 96 P.2d 826; 20 Am. Jur., Evidence, sec. 1144, p. 998; 1 Rest. Contracts, sec. 235(e).

II. *Was it error to include as income under the agreement the profits made by defendant in real estate transactions, a part of which may be subject to a claim by a third party?*

Defendant joined with one Jacob Barman as joint adventurer for the purpose of purchasing and selling real property, the profits to be divided evenly between them. As a result of this agreement certain of the profits paid to defendant and treated by him as his own income are asserted to be subject to a possible claim by Jacob Barman. Defendant asserts that he has paid Barman in full, and owes him nothing, but that since Barman denies this and claims that money is owing him, he should be allowed a credit. The testimony of Barman makes it clear that while originally he had made such claim, this claim was satisfied by the transfer to Barman of one-half of the stock in the corporation hereafter discussed. The testimony of Barman, in part, was as follows:

"Mr. Postel: Now, as far as you are concerned, the formation of this corporation settled all finances between you and Mr. Kent? A. That's right. * * * Q. In other words, when you formed the corporation, you started even, with a clean sheet, so far as you and Mr. Kent were concerned, is that a fact. A. That's right."

[4] In view of the state of the record, it would be manifestly unjust to deny plaintiff the right to participate in these moneys, as to which Barman expressly testified that his claim had been settled.

III. *Was it error to admit into evidence testimony regarding the affairs of the Federated Investment Co., and to find that the salary paid to defendant was in fact a dividend and hence within the definition of income in the property settlement agreement?*

Two parcels of rental-bearing real property purchased by defendant under the joint venture agreement with Barman were conveyed to a corporation formed for the purpose in which defendant owned one-half the stock and Barman and his wife the other one-half. The inquiry here concerns the sum of $3,600 paid to defendant by said corporation as a salary for the year 1946, a like amount having been paid to Barman as a salary for the same period. The trial court found the net income of the corporation for 1946 to have been $7,935.02 and further found the payments of $3,600 to each of the two stockholders to have been in fact dividends.

[5] There is abundance of legal authority to support this finding. In De Martini v. Scavenger's Protective Ass'n, 3 Cal.App.2d 691, 40 P.2d 317, this court considered a similar question and held that excessive salaries paid to stockholders of a corporation should be treated as dividends. The same rule was applied in Nichols v. Olympic Veneer Co., 135 Wash. 8, 236 P. 794 and Nichols v. Olympic Veneer Co., 139 Wash. 305, 246 P. 941. Many similar cases may be found in the books. Grants Pass Hardware Co. v. Calvert, 71 Or. 103, 142 P. 569; In re Wilson's Estate, 85 Or. 604, 167 P. 580; Freeman v. Rogers White Lime Co., 138 Ark. 312, 211 S.W. 146; Hartley v. Pioneer Ironworks, 181 N.Y. 73, 73 N.E. 576; Thiry v. Banner Window Glass Co., 81 W.Va. 39, 93 S.E. 958, L.R.A.1918B, 1048; United States v. Mellon, 3 Cir., 279 F. 910, Id., 3 Cir., 281 F. 645; Marble & Shattuck Chair Co. v. Comm'r of Internal Revenue, 6 Cir., 39 F.2d 393; Jacobs & Davies v. Anderson, 2 Cir., 228 F. 505; Doyle v. Mitchell Brothers Co., 247 U.S. 179, 38 S.Ct. 467, 62 L.Ed. 1054. The rule to be gleaned from these cases is that, however denominated, a distribution of earnings to corporate stockholders may be treated as dividends where that is their practical effect and justice will be served by so treating them.

In this case it appeared that the services rendered by defendant to the corporation were hardly more than nominal, that $3,600 was almost one-half of the corporate earnings for the year and bore no reasonable relation to the services rendered.

Defendant's claim in this court that some portion of the $3600 should have been allowed him for the reasonable value of the services actually performed by him is not tenable for several reasons: He made no attempt to prove the reasonable value of his services; they were so slight as to be practically inconsequential; the salaries were fixed on September 18, 1946 after it was apparent that the earnings for the year would approximate their total; by admission of his counsel defendant was using the corporation in a deliberate attempt to minimize his earnings subject to the agreement with his wife and on all the facts the trial court was entitled to conclude that the entire purported salary was in fact a division of the profits of the corporation.

[6] Defendant's citation of cases holding that a court will not intermeddle in the internal affairs of a corporation is not pertinent. The court did not interfere with any corporate activity. It merely inquired into the corporate transactions to determine the true nature of the payment to defendant

under the guise of salary. That it had this power is attested by the cases hereinabove cited.

IV. *Was it error for the trial court to include in its judgment plaintiff's share of defendant's income subsequent to 1945?*

[7] The amended complaint was filed, as above noted, on November 15, 1946. At that time the 1946 income was not ascertained and the payments based thereon would not begin to accrue under the agreement until January, 1947. The allegations of the complaint were directed to the previous years, the only period that could at that time be put in issue, but the prayer was for a general accounting. At the time of trial, however, 1946 was complete and payments had been made for 1947, purportedly based on defendant's 1946 income. The situation permitted and justified an accounting for that year. Defendant's only argument here is that plaintiff should have filed a supplemental complaint covering 1946. Under the decisions that was not necessary.

The precise question was ruled on by this court in Union Oil Co. v. Mutual Oil Co., 19 Cal.App.2d 409, 65 P.2d 896. In that case complaint for an accounting of the proceeds from oil and gas removed from premises leased by plaintiffs was filed and without supplemental pleadings the account was taken to the time of trial. This court said 19 Cal.App.2d at page 412, 65 P.2d at page 897: "The findings and judgment were responsive to the issues thus made and in our opinion it was unnecessary for plaintiffs to file supplemental pleadings in order to sustain the money judgments which included the value of the oil and gas so taken both before and after the filing of the complaint and up to the time of the entry of judgment. It was the duty of the trial court under the circumstances to adjust the rights of the parties up to the time of the entry of judgment and to leave nothing open to further litigation."

The rule was thus announced by the Supreme Court of Illinois in Rhodes v. Ashurst, 176 Ill. 351, 52 N.E. 118, 120: "The interlocutory decree usually directs that all matters of account shall be adjusted down to the time of stating the account, even though no facts are stated in respect to them in the pleadings. 1 Enc.Pl. & Prac. p. 103. To hold that matters of account arising during the pendency of the suit could not be considered would be to circumscribe the power of equity to do complete justice, which is one of its attributes."

[8] The technical nature of defendant's argument is shown by his admission that if a supplemental complaint had been filed the inquiry into the 1946 transactions would have been unobjectionable. Since the adoption of sec. 4½ art. VI of our Constitution such objections, even though well founded, are not grounds for reversal on appeal unless the court can find that an appellant has suffered prejudice. Steffen v. Refrigeration Discount Corp., 91 Cal.App.2d 494, 205 P.2d 727, and cases there cited.

Plaintiff's Appeal.

I. *Was the trial court in error in not finding that Federated Investment Co. was the alter-ego of defendant, and that half of the income of the corporation should have been included in computing defendant's net income?*

The corporation was formed after plaintiff had made demands on defendant for an accounting of his income and the two income-bearing parcels of property previously purchased by defendant through Barman were conveyed to it. The capital stock was issued one-half to defendant and one-half to Barman and his wife. The three directors were defendant, one of defendant's attorneys and a secretary of one of defendant's attorneys. Not until January, 1948 did Barman become an officer. During the period involved in the accounting it is clear that defendant dominated the corporation and his counsel is frank to admit that one of the purposes of the corporation's formation was to minimize defendant's payments to his wife.

[9] As stated in 6a Cal.Jur. p. 75: "It is the law in California as elsewhere that, although a corporation is usually regarded as an entity separate and distinct from its stockholders, both law and equity will, when necessary to circumvent fraud, protect the rights of third persons and accomplish jus-

tice, disregard this distinct existence and treat them as identical." The issue is not so much whether, for all purposes, the corporation is the "alter-ego" of its stockholders or officers, nor whether the very purpose of the organization of the corporation was to defraud the individual who is now in court complaining, as it is an issue of whether in the particular case presented and for the purposes of such case justice and equity can best be accomplished and fraud and unfairness defeated by a disregard of the distinct entity of the corporate form. 1 Fletcher, Cyc. Corporations pp. 134, 136, 143 and 165. The case law of California is in support of this generally recognized view, the cases expressing the doctrine of disregard of the entity in varying language, sometimes rather broad and sometimes more narrow. The leading and most often cited case in California, Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, 696, 227 P. 723, 731 states it as follows: "While it is the general rule that a corporation is an entity separate and distinct from its stockholders, with separate, distinct liabilities and obligations, nevertheless there is a well recognized and firmly settled exception to this general rule, that, when necessary to redress fraud, protect the rights of third persons, or prevent a palpable injustice, the law and equity will intervene and cast aside the legal fiction of independent corporate existence, as distinguished from those who hold and own the corporate capital stock, and deal with the corporation and stockholders as identical entities with identical duties and obligations." In Continental Securities & Investment Co. v. Rawson, 208 Cal. 228, 238, 280 P. 954, 958 after stating the doctrine substantially as it appears above, the court said: "When the corporation is organized or perpetuated for the particular purpose of carrying out the plans of partners or associates in business, the same rule has been held to apply. (Citations.) Whether the corporation be deemed a 'one man' corporation or, as here claimed, a 'two man' corporation, the rule would be the same and the two essential elements must be present." (The significant elements were stated to be (1) control, and (2) a state of facts upon which an adherence to the separate entity would be unjust.) In a recent case, Katenkamp v. Superior Court, 16 Cal.2d 696, 700, 108 P.2d 1, Justice Traynor expresses the doctrine thusly: "* * * while a corporation is usually regarded as an entity separate and distinct from its stockholders, both law and equity will, whenever necessary to circumvent fraud, or protect the rights of third persons, disregard this distinct existence and treat them as identical." See also Erkenbrecher v. Grant, 187 Cal. 7, 9-10, 200 P. 641; Offeman v. Robertson-Cole Studios, Inc., 80 Cal.App. 1, 12, 251 P. 830; Mills v. Richmond Co. Inc., 63 Cal.App. 594, 597, 219 P. 465; Higgins v. California Petroleum & Asphalt Co., 147 Cal. 363, 81 P. 1070; Puccetti v. Girola, 20 Cal.2d 574, 578, 128 P.2d 13; Stark v. Coker, 20 Cal.2d 839, 846, 129 P.2d 390; Watson v. Commonwealth Ins. Co., 8 Cal.2d 61, 68, 63 P.2d 295; McCormick Saeltzer Co. v. Grizzly Creek Lumber Co., 74 Cal.App. 278, 285, 240 P. 32; Judelson v. American Metal Bearing Co., 89 Cal.App.2d 256, 262-263, 200 P.2d 836; Hillman v. Hillman Land Co., 81 Cal.App.2d 174, 183-185, 183 P.2d 730.

[10] In the instant case there may well have been various business reasons sufficient to justify and support the formation or continuation of the corporation on the part of defendant. For such purposes the Federated Investment Co. still stands. The trial court found, in this case, "That counsel for defendant Kent stated in open court as an admission that one of the purposes for the formation of said Federated Investment Company and the transfer of said properties to it was to minimize the alimony payments which the defendant was and is required to pay to plaintiff under said agreement of August 26, 1942." This admission is reiterated in defendant's reply brief. Counsel for defendant argues by analogy to income tax cases that the use of corporate forms to minimize payments is unobjectionable. There is little similarity between tax cases, where the proceedings are in invitum and contract obligations. Defendant entered into an obligation, by the property settlement agreement of 1942, to pay to plaintiff a portion of his income

from property. This obligation was entered into voluntarily, solemnly, and with full knowledge and advice of counsel. It may have imposed a duty upon him which he has since regretted and which he now finds most onerous. He nevertheless is bound by the agreement. His duty is to live up to the agreement in letter and spirit. Subterfuges which are designed to circumvent said agreement should not be looked upon with favor by the courts. The essence of the formation of this corporation was to transfer the property of a joint venture to a corporation owned by the joint adventurers (and the other joint adventurer's wife) and thereby attempt to avoid this solemn obligation, and though the corporate form may be continued, if desired, for other purposes, it will not be recognized by this court for the purpose here in question. The law of this state is that the separate corporate entity will not be honored where to do so would be to defeat the rights and equities of third persons.

II. *Was it error for the trial court to deny plaintiff 30% of the rental value of the Eva Heller Kohn trust's interest in the Hillsborough home, occupied by defendant Kent?*

There is no dispute that plaintiff is entitled to 30% of whatever income from the Eva Heller Kohn trust is paid over to defendant. A certain amount of the corpus of the trust was used (together with a lesser amount of defendant's own money) to purchase a home in Hillsborough. As a result of this transaction, the trust has a two-thirds interest in said property, and defendant has a one-third interest. Permission was obtained by the trustees, from the probate court, to permit defendant to live in the home, rent free, the trust paying two-thirds of the taxes and maintenance of the home. The issue is whether the use of the home, rent-free, is not income to defendant, to the extent of two-thirds the rental value thereof.

[11] By paragraph 11(c) plaintiff relinquished her rights to the corpus of the trust, but excepted therefrom "any rights * * * to the income from said trusts after the same is paid (to defendant)." Is the use of the home, rent-free, income to defendant? Income is defined by paragraph 5(a) to consist of: "The gross yearly receipts * * * in cash or its equivalent * * *." This definition is not broader than definitions applied in other cases without benefit of a contractual agreement. 42 C.J.S., Income pp. 528-529; Schloesser v. Schloesser, 329 Ill.App. 604, 70 N.E.2d 346; People v. Savings Union, 72 Cal. 199, 203, 13 P. 498, quoting from People v. Supervisors, 4 Hill N. Y. 20; Bates v. Porter, 74 Cal. 224, 239, 15 P. 732; Yuengling v. Comm'r of Internal Revenue, 3 Cir., 69 F.2d 971, 972. There can be no doubt that rent received by the trust would be income to it. And if paid over to defendant it would be income to him and subject to plaintiff's claim of 30%. There can be no question but that the trust is losing income, for the benefit of defendant, as a result of permitting him to use the home rent free, and that defendant benefits and gains by this arrangement in that he thereby obtains the use of property without expenditure of his own capital, and without paying for such use of another's property. That defendant is not in receipt of income in the form of cash is clear but, although it is more subtle, it does not seem maintainable that defendant's use of the trust's interest in the home is not income to him. He is in receipt of a valuable tangible asset, namely, the use of the home. He has agreed that he will pay to respondent 30% of his income "in cash or *its equivalent*" as defined in the agreement. In compliance with the agreement, defendant will be compelled to pay to plaintiff 30% of the value of such income, whether "cash or its equivalent", as is received by him.

III. *Did the trial court err in denying to plaintiff 30% of the realized capital gain upon the sale by defendant of the Marin County property?*

[12] Paragraph 5(a) of the property settlement agreement, in defining "net income", states that capital gains are not to be included "unless such capital gains and profits be reduced to cash or other liquid form, in which latter event, any profit realized by capital sales or conversions, or otherwise, shall constitute income." Para-

graph 5(b) exempts the receipt of rents from the Marin County property from net income, upon certain conditions, and paragraph 11(e) relinquishes all claim of plaintiff to the Marin County property itself. Paragraph 11 is designed to settle actual property interests, and there can be no question that plaintiff has released all her right to the property itself. But paragraph 11 does not purport to affect the income provisions of the agreement. The income provisions (paragraph 5) appear to have the plain meaning that whenever defendant sells *any* property (except that received by gift or devise after the execution of the agreement) which is his own, or to which plaintiff has released all her right, she is entitled to 30% of the gain derived from such sale. The fact that plaintiff has relinquished all of her right, or never had any right in the property sold, simply means that she will not participate in the proceeds of the sale to the extent that the proceeds simply reconstitute the initial capital investment in the property. But to the extent that there is a gain in the sale, plaintiff's interest is governed by the income provisions of the agreement. The fact that plaintiff has no right to the rent from the property has no bearing upon the problem, unless it indicates a proper case for the application of the doctrine *expressio unius est exclusio alterius;* that the express releases of income from rent indicates a reservation of the unreleased income from capital gain. This is simply a problem of construing a contract, and it seems clear that defendant is bound by the provision in paragraph 5(a) to pay to plaintiff 30% of any realized capital gain.

Whether or not there was any capital gain from the sale of the Marin County property was not determined and we express no opinion thereon. That will present a question of fact for the trial court. The court was in error in finding that plaintiff is not entitled to 30% of the net income, if any, from the sale of the Marin County property and in expressly refusing to find "whether or not any net income was made * * * in the sale of said Marin County property * * *."

The judgment is reversed insofar as it failed to adjudicate plaintiff's right to receive 30% of 1. defendant's one-half interest in any undistributed income of Federated Investment Company; 2. the reasonable rental value of the undivided two-thirds interest of the Eva Heller Kohn trust in the Hillsborough home occupied by defendant and 3. the capital gains, if any, from the sale by defendant of the Marin County properties; in all other particulars the judgment is affirmed. Plaintiff to recover costs on both appeals.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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95 Cal.App.2d 918

KOHN v. KOHN et al.

Civ. 14106.

District Court of Appeal, First District,
Division 2, California.
Jan. 26, 1950.
Rehearing Denied Feb. 25, 1950.
Hearing Denied March 23, 1950.

Doris Kohn sued Marion H. Kohn, also known as Marion H. Kent, and Jacob Barman and others, for enforcement of property settlement agreement which provided that the first named defendant was to pay 30 per cent of his income for the previous year to plaintiff wife.

The Superior Court in and for the city and county of San Francisco, Theresa Meikle, J., rendered judgment. The first-named defendant appealed and plaintiff cross-appealed.

The District Court of Appeal, Dooling, J., held that certain receipts of defendant constituted income within meaning of agreement and therefore were subject to payment to plaintiff under the settlement agreement to the extent of 30 per cent.

Order affirmed.

See also 214 P.2d 80.

1. Husband and wife 🔑279(1)

Under agreement between divorced husband and wife incorporated into divorce decree providing that husband was to pay 30 per cent of his income for previous year to wife, but which excluded amounts received as compensation for personal services from income, treatment by trial court of sum received as salary from corporation of which he owned one-half interest as a "dividend" within meaning of income in agreement was not error.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Dividend".

2. Husband and wife 🔑279(1)

Where agreement between divorced husband and wife incorporated in divorce decree providing that husband was to pay 30 per cent of his income for previous year to wife defining income so as to include all gross yearly receipts and also providing that wife assigned to husband all her interest in certain moneys received by him by way of compromise of will contest, income received from funds acquired under compromise of will contest would be considered as "income" within terms of agreement subject to distribution to wife to extent of 30 per cent.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Income".

Philip S. Ehrlich, Albert A. Axelrod, R. J. Hecht, San Francisco, for appellant.

Erskine, Eskine & Tulley, Morse Erskine, San Francisco, Gavin McNab, Schmulowitz, Aikins, Wyman & Sommer, by Nat Schmulowitz, Peter S. Sommer, Sidney DeGoff, San Francisco, for respondent.

DOOLING, Justice.

[1, 2] Defendant appeals from an order directing him to pay plaintiff for her support under the terms of a final decree of divorce at the rate of $530.40 per month during the year 1948. The amount is based upon the net earnings of defendant in 1947 calculated in accordance with the property settlement agreement which was made a part of the decree, and has been construed in Kohn v. Kohn, Cal.App., 214 P.2d 71. Two items of income included by the court are questioned: 1. a sum paid to defendant as salary by Federated Investment Co. which the court treated as a dividend; and 2. income received from property acquired from the estate of George Kohn, deceased.

Appellant's similar contentions in Kohn v. Kohn, supra, were disposed of adversely to him and no purpose would be served by repeating the discussion of them.

Order affirmed.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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95 Cal.App.2d 722

KOHN v. KOHN.

Civ. 14137.

District Court of Appeal, First District,
Division 2, California.
Jan. 26, 1950.

Doris Kohn sued Marion H. Kohn, also known as Marion H. Kent, to recover additional alimony under a property settlement agreement.

The Superior Court in and for the city and county of San Francisco, Theresa Meikle, J., entered an order allowing plaintiff $1,500 as an attorney's fee to resist defendant's appeal from an order requiring defendant to pay an additional amount of $2,890.40, and defendant appealed.

District Court of Appeal, Dooling, J., held that the attorney's fee was excessive.

Order reversed.

1. Divorce 🔑222

Counsel fees may not be allowed in divorce proceedings where motion therefor is not made until after services have been performed.

2. Divorce 🔑226

Husband could not complain that motion for attorney's fee for wife in proceeding to recover additional alimony under settlement agreement was too broad, where he admitted in affidavit filed in opposition to motion that wife was entitled to an order for reasonable counsel fees and costs pending appeal.

3. Divorce ⚷227(2)

Where husband was ordered to pay wife additional sum of $2,900 as alimony under settlement agreement and wife's counsel on appeal from order by husband filed an 18 page printed brief, $1,500 as attorney's fees to resist husband's appeal from order was excessive.

4. Divorce ⚷286

Affidavits included in record certified by clerk in action by divorced wife against husband to recover additional payments of alimony under settlement agreement would be presumed to have been considered by trial court and appeal from order requiring husband to make additional payments would not be treated as a judgment roll appeal. Rules on Appeal, rules 5(b), 8(a), 52.

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Philip S. Ehrlich, Albert A. Axelrod, R. J. Hecht, San Francisco, for appellant.

Erskine, Erskine & Tulley, Morse Erskine, San Francisco, Gavin McNab, Schmulowitz, Aikins, Wyman & Somer, By Nat Schmulowitz, Peter S. Sommer, Sidney DeGoff, San Francisco, for respondent.

DOOLING, Justice.

Defendant appeals from an order allowing plaintiff $1,500 as an attorney's fee and $200 as costs to resist defendant's appeal from the order involved in Kohn v. Kohn, Cal.App., 214 P.2d 79, this day affirmed by this court.

[1] Plaintiff asked for counsel fees for services already performed as well as for those necessary to resist the appeal but the court properly made an allowance only for future counsel fees to resist the appeal, following the settled rule that counsel fees may not be allowed where the motion therefor is not made until after the services have been performed.

[2] Appellant argues that the motion having been too broad it will not even support the allowance of counsel fees to resist the appeal. Appellant is in no position to urge this point since in his affidavit filed in opposition to the motion he stated:

> "Affiant admits that the plaintiff is entitled to an order for reasonable counsel fees and costs pending appeal from the order dated December 3, 1948 * * *."

[3] Appellant's claim that the sum of $1,500 is unreasonably large for counsels' services in resisting the appeal is well grounded. By the order appealed from defendant was ordered to pay plaintiff an additional sum for 1948 of $2,890.40. On the appeal respondent's counsel filed an 18 page printed brief. $1,500 is out of all proportion to the amount recovered and the work reasonably involved in resisting the appeal.

[4] Respondent argues that we should treat this as a judgment-roll appeal. Affidavits are included in the record which is certified by the clerk. Under Rules 5(b) and 8(a), Rules on Appeal, we must presume that these affidavits were considered by the court, Redstead v. Weiss, 71 Cal.App.2d 660, 665-666, 163 P.2d 105, and we can no longer assume that the court considered any other matter not in the record since under Rule 52, Rules on Appeal, "it shall be presumed * * * that (the record) includes all matters material to a determination of the points on appeal" Alkus v. Johnson-Pacific Co., 80 Cal.App.2d 1, 181 P.2d 72; Palpar, Inc., v. Thayer, 82 Cal.App.2d 578, 186 P.2d 748.

The order is reversed with directions to the trial court to rehear the motion and make an allowance for counsel fees in resisting the appeal from its order of December 3, 1948 commensurate with the amount involved and the work reasonably performed by counsel and to allow the costs actually incurred in resisting such appeal.

NOURSE, P. J., and GOODELL, J., concur.

95 Cal.App.2d 745

SULLIVAN v. CITY & COUNTY OF SAN FRANCISCO et al.

Civ. 14123.

District Court of Appeal, First District,
Division 1, California.

Jan. 27, 1950.

Rehearing Denied Feb. 25, 1950.

Hearing Denied March 27, 1950.

Frank R. Sullivan, Jr., brought action against the City and Couity of San Francisco, a municipal corporation, and James G. Wilkinson, Albert Shell, and William Berman to recover for injuries sustained by plaintiff when a streetcar on which the plaintiff was riding, struck a parked truck driven by James G. Wilkinson and owned by Albert Shell and William Berman.

The Superior Court in and for the City and County of San Francisco, George W. Schonfeld, J., rendered judgment for the plaintiff against the City and County of San Francisco for $125,000, and the City and County of San Francisco appealed.

The District Court of Appeal, Peters, P. J., held that the Workmen's Compensation Act was not applicable, that the City and County of San Francisco, as a joint tort feasor, had no legal right to complain that other defendants were exonerated from liability, that verdict was not excessive, that hypothetical question was not erroneous, that omission to give qualifying instruction was not error, that remarks of Superior Court were not erroneous, and that it was not error to permit plaintiff to file an amended complaint increasing request for damages.

Judgment affirmed.

1. Workmen's compensation 🔑719

Injuries received by an employee while going to or coming from his place of employment, are generally not compensable. Labor Code, § 3201 et seq.

2. Workmen's compensation 🔑734

If an employer, as an incident of the employment, furnishes his employee with transportation to and from place of employment, and means of transportation are under control of employer, an injury sustained by employee during such transportation is one "arising out of and in course of employment" and is compensable. Labor Code, § 3201 et seq.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Arising Out Of and In Course Of Employment".

3. Workmen's compensation 🔑740

Fact that employee of city may pay something for privilege of riding on streetcar of city or that transportation is furnished on a conveyance used by general public is immaterial in determining whether employee is in course of employment within meaning of Compensation Act, and the fundamental point is that transportation must be furnished pursuant to terms of contract of employment. Labor Code, § 3201 et seq.

4. Workmen's compensation 🔑737

When an employee, as an incident of his employment, accepts a ride on a means of transportation furnished by the employer, whether means of conveyance be public or private, employee is covered by the Compensation Act. Labor Code, § 3201 et seq.

5. Workmen's compensation 🔑740, 2090

Where fireman of city was entitled to ride on streetcars of city, to and from work free by showing his badge, but fireman did not know that he was entitled to do so and at time of injury on streetcar he had paid same fare usually paid by the general public, he was riding as a passenger and not as an employee of the city, and was entitled to maintain an action against city for his injuries and was not relegated to proceeding under Workmen's Compensation Act. Labor Code, § 3201 et seq.

6. Automobiles 🔑245(22, 50)

In action against city operating streetcar and owners and driver of truck by passenger on streetcar for injuries sustained by passenger when streetcar struck parked truck, it was error to grant nonsuit as to owner and driver of truck if there was any evidence from which jury might have found that truck driver was negligent and that his negligence was a proximate cause of the accident.

7. Appeal and error 🔑880(3)

In action against city operating streetcar and owner and driver of truck by passenger on streetcar for injuries sustained by passenger when streetcar struck parked truck, city, as a joint tort feasor, had no right to complain that owners and driver of truck were exonerated from liability, where there was no right of contribution between joint tort feasors.

8. Appeal and error ⚷1064(1)

Where two moving vehicles collide and injure plaintiff under circumstances where either or both owners of the moving vehicles could be liable, erroneous instruction that one of the owners could have been the sole cause of the accident, is prejudicial where the evidence shows not only that negligence of the two owners may have caused the accident, but that the negligence of either one may have been the sole proximate cause.

9. Appeal and error ⚷880(3)

In action against city operating streetcar and owners and driver of truck by passenger on streetcar for injuries sustained by passenger when streetcar struck parked truck, city was not prejudiced by alleged erroneous granting of nonsuit as to driver and owners of truck.

10. Appeal and error ⚷1004(1)

The District Court of Appeal may interfere with an award of damages, on ground that it is excessive, only if it appears, as a matter of law, that award was result of passion or prejudice.

11. Damages ⚷132(3)

Award of $125,000 to 21 year old fireman for four comminuted fractures of the pelvis and transverse process of the fifth lumbar vertebra resulting in impotence and psychoneurosis, was not excessive.

12. Evidence ⚷553(4)

A hypothetical question should be based on facts shown by the evidence.

13. Evidence ⚷553(3)

A party is entitled to base his hypothetical question on any reasonable inference from the evidence, and it is for the jury to decide whether such inference is sound.

14. Evidence ⚷553(3)

Where there was evidence of doctors in action for injuries that it was reasonably probable that plaintiff would be impotent, and that such impotency would probably be permanent, it was not error to ask hypothetical question relating to impotency.

15. Trial ⚷255(14)

In injury action, failure of trial court, on its own motion, to give instruction that life expectancy, as shown by mortality tables, is a mere average based on a limited record of experience, that inferences based on such tables only apply to one who is in average health, and that jury must consider not only the mortality tables but all evidence bearing on the same issue, was not error.

16. Trial ⚷29(1)

In injury action, wherein counsel for plaintiff stated that the loss of plaintiff's earning power was reduced $150 a month, and that for the 44 years of plaintiff's life expectancy, loss of earning power amounted to $66,000, trial court did not err in stating that counsel made a mistake in his mathematics and that loss of earning power would amount to $79,200.

17. Municipal corporations ⚷741(1)

The permission given to plaintiff to file an amended complaint in injury action increasing demand from $50,000 to $150,000, was not error, though claim filed by plaintiff against city while he was still in the hospital was for only $50,000.

◆

Dion R. Holm, City Attorney, City and County of San Francisco, Edmond P. Bergerot, Deputy City Attorney, City and County of San Francisco, George E. Baglin, Deputy City Attorney, City and County of San Francisco, San Francisco, attorneys for appellants.

Melvin M. Belli, San Francisco, attorney for respondent.

PETERS, Presiding Justice.

Plaintiff brought this action against the City and County of San Francisco and various Does for injuries received by him while riding on a City streetcar. The jury returned a verdict of $125,000. From the judgment entered on that verdict the City appeals.

The accident occurred on August 11, 1947. On June 20, 1947 plaintiff had been sworn in as a temporary non-civil service fireman. Such employees are issued a badge and a rule book, but are not required to purchase a regular uniform. They work in dark trousers and a dark shirt. About three weeks before the accident plaintiff was assigned to Engine No. 14, located at McAllister and Webster Streets, his daily shift starting at 6 p. m. On the day in question he decided to go to work rather early, and for this purpose took a Geary streetcar, paid his fare and secured a transfer. At Geary and Fillmore he boarded a number 22 car going south on Fillmore, presenting his transfer to the conductor. This streetcar was one of the oldest in the City's service, and was burned after the accident rather than repair it. The car was crowded, and plaintiff remained on the rear platform together with four or five other passengers. The streetcar had folding doors on the exit side of the rear platform. Plaintiff testified that at all times prior to the accident he was holding on, with both hands, to the rail around the control box located at the extreme rear of the car. The accident happened between Eddy and Turk Streets. There one Wilkinson had parked a truck in such a way that its rear end was close to the streetcar tracks. When the streetcar approached the truck, the motorman, being doubtful as to whether the streetcar would clear the truck, stopped, and both he and the conductor looked to see if there was sufficient clearance between the streetcar and the stationary unoccupied truck. The conductor signalled the motorman to proceed, which he did, at a slow rate of speed. When the streetcar was about half way past the truck the motorman again stopped. He did not then look at the truck and streetcar, but the conductor did. The conductor gave the signal to proceed, and the motorman went ahead. When the rear doors of the streetcar were opposite the edge of the parked truck they came into contact with the truck, resulting in the doors being thrown open and in plaintiff being thrown from the platform. He was caught between the truck and the streetcar and received the very serious injuries hereafter described.

While still in the hospital as a result of his injuries, plaintiff filed a claim against the City for $50,000, which was rejected. The original complaint named the City as the sole defendant and asked for $50,000 damages. By amendments, the driver and owners of the truck were brought in as defendants, and, with court permission, the prayer was amended to ask for $150,000 damages.

The City in addition to denying its own negligence, admitted the negligence of Wilkinson in parking the truck, as alleged, as a separate defense, that the accident was solely and proximately caused by the negligence of the driver and owners of the truck. The City also pleaded as a special defense, that, at the time of the accident, plaintiff was a City employee on his way to work on transportation furnished by his employer as an incident of the employment; that, under such circumstances, the injury arose out of and in the course of the employment; that plaintiff's exclusive remedy against the City was under the Workmen's Compensation Act, Labor Code, § 3201 et seq., and not in the Superior Court. By an amendment to its answer, the City also set up the special defense that the plaintiff was limited to a recovery not to exceed $50,000 because that was the amount of the claim filed by plaintiff.

The case proceeded to trial. At the conclusion of plaintiff's case, the driver and the owners of the truck moved for a nonsuit. The motion was unopposed by plaintiff or by the City, and was granted. Thereafter, the case proceeded against the City alone, resulting in a verdict for $125,000 for plaintiff.

On this appeal the City sets forth many claims of alleged error, but they all fall into three main categories. First, it is contended that plaintiff's sole remedy against the City was before the Industrial

Accident Commission, and that the Superior Court had no jurisdiction of the controversy. Second, it is urged that the trial court erroneously instructed the jury that the negligence of the truck driver could not and should not be considered by the jury, thus, so it is claimed, depriving the City of its pleaded defense that the sole cause of the accident was the negligence of the truck driver. The third series of claimed errors center around the basic contention that the judgment is excessive. In addition to the assertion that the judgment is excessive as a matter of law, it is urged that it is partially based on an erroneous assumption in a hypothetical question plaintiff's counsel, over objection, was permitted to ask, and on an erroneous, because incomplete, life expectancy instruction. It is also urged that the trial judge made a misleading suggestion to the jury, during argument, as to the amount necessary to compensate plaintiff for his loss of prospective wages. The judgment is also claimed to be excessive on the ground that plaintiff is limited to $50,000, the amount set forth in his claim filed with the City. These claimed errors will be considered in order.

Did the Superior Court have jurisdiction in this action?

At the threshold of this appeal we are met with the contention that, since plaintiff was admittedly a City employee to whom transportation was furnished as an incident of his employment, he was in the course and scope of his employment when injured, and therefore, so far as the City is concerned, his exclusive remedy was to proceed before the Industrial Accident Commission and secure compensation.

The facts are these: The rules of the fire department and of the streetcar company provide that a fireman may ride on his badge without payment of fare. Admittedly, when plaintiff went to work for the City, he was given a copy of the rule book containing this rule. Plaintiff testified that he had not read this rule and did not know of its existence; that he thought only firemen in uniform could ride on their badge; that a fireman always wears his badge on the vest of his uniform, and that as a temporary non-civil service employee he had no vest; that when he received his badge he placed it in the bureau drawer at home and never removed it; that he did not have his badge with him at the time of the accident; that on the day of the accident he paid his fare on the Geary streetcar with a token, and on the Fillmore streetcar with a transfer. After the accident, his badge was not in his clothing.

There is some conflict as to the exact time of the accident, but the records of the hospital, to which plaintiff was taken immediately after the accident, show that plaintiff was received at 4:10 p. m., so that the accident must have happened about 4:00 p. m. It occurred only a few short blocks from the firehouse where plaintiff was due to go to work at 6:00 p. m. Plaintiff testified that he was on his way to the firehouse and that he occasionally arrived early. There is some testimony about the possibility that plaintiff was intending to relieve a regular fireman at 5:00 p. m., but this could only be done with the consent of the officer in charge given in advance and entered in the books of the firehouse. There was no such entry in the books. There is also evidence that, although a fireman who arrives at his firehouse early does not respond to any fire alarm coming in before the start of his shift, he may so respond with the consent of the officer in charge.

There is also one other evidentiary matter that should be mentioned. Plaintiff filed his claim with the City on August 19, 1947. One day later, Ralph R. Nelson, the consulting actuary of the San Francisco Retirement Board, wrote a letter to plaintiff in which he stated, among other things, that: "It was the opinion here, on the basis of information received, that your injury did not arise out of and in the course of your employment, as required under the State Compensation Law, and consequently the City and County has no liability in connection with any injury you may have had.

"I well understand that you have not made claim that the injury results from your work, but I thought that this letter should be sent in order to avoid any possibility of misunderstanding." This letter was admitted into evidence over the City's objections. The City claims this was error; that the letter merely stated the informal and erroneous opinion of an employee of the Retirement Board who had no authority to bind that Board. Among other things, plaintiff contends that the entire file of the Board was introduced by stipulation, and that the file included this letter. There is no doubt that the file of the Board was introduced by stipulation, but it is quite doubtful, in view of the City's repeated objections, that it was intended that the letter should be included in the stipulation.

At the close of the testimony the City moved for a directed verdict on the ground that the exclusive forum with jurisdiction was the Industrial Accident Commission. After some discussion between counsel, the following occurred:

"Mr. Belli: Are you gentlemen willing to submit it to his Honor and let him decide it on—as a matter of law? Are you willing that the question be decided by the Court as a question of law?

"Mr. Bergerot: I think so.

"Mr. Belli: We will stipulate your Honor may decide this as a question of law.

"Mr. Bergerot: Whatever the decision is there will be no argument to the jury about this at all.

"Mr. Belli: That is right, and his Honor will determine the liability."

Thus, this issue was taken from the jury by stipulation of counsel. After some discussion the judge denied the motion for a directed verdict, giving as his reasons: (1) That it was undisputed that plaintiff did not ride on his badge, but paid his fare; (2) that plaintiff was not due at work until 6:00 p. m. and was hurt at 4:00 p. m., less than half a mile from his place of employment; and (3) he did not have to take the Fillmore streetcar to get to work but could have walked, and had he been injured while walking, the City would have resisted paying compensation.

Thus, it is apparent that the admission of the Nelson letter, even if error (a point we do not decide), could not have been prejudicial. The compensation issue, by stipulation, was completely removed from the consideration of the jury. The trial judge did not rely upon the Nelson letter, nor did he refer to it. It could not have affected the jury because the issue involved in the letter was not before the jury.

It is quite clear that counsel agreed that the compensation issue should be decided by the trial judge. It is true that counsel referred to the judge deciding it as a "question of law," but it is important to note that if the issue required a determination of fact based on conflicting evidence, the trial judge was empowered to decide this question of fact. Thus, for example, the City urges that we should consider the reasonable inference that if a man can ride free, he will ride free. That conflict with plaintiff's otherwise uncontradicted evidence that he did pay his fare (if it does present a conflict) was resolved by the trial judge, and his determination must be upheld if supported. Any other factual issue involved in determining the compensation issue, and based on conflicting evidence or upon conflicting inferences from the evidence, must be held to have been decided adversely to the City, and cannot now be considered. The City is in no position to complain that any factual problem involved in this issue was withdrawn from the jury. That was done with its consent. To prevail on this issue the City must accept the facts most strongly against it, and demonstrate that under such facts, as a matter of law, this is a compensation and not a personal injury case. This, the City has not done.

[1, 2] It is, of course, Hornbook law that, generally speaking, injuries received by an employee while going to or coming from his place of employment are not compensable under the Workmen's Compensation Act. It is equally true, and equally as elementary, that "if an employer, *as an incident of the employment,* furnishes his employee with transportation to and from the place of employment and the means of

transportation are under the control of the employer, an injury sustained by the employee *during such transportation* arises out of and is in the course of the employment and is compensable." (Italics added.) California Casualty Indemnity Exchange v. Industrial Accident Comm., 21 Cal.2d 461, 463, 132 P.2d 815, 816.

[3] The fact that the employee may pay something for the privilege of riding, or that the transportation is furnished on a conveyance used by the general public is immaterial, if the transportation is furnished and being used as an incident to the employment. City and County of San Francisco v. Industrial Accident Comm., 61 Cal.App.2d 248, 142 P.2d 760. The fundamental point is that the transportation must be furnished pursuant to the express or implied terms of the contract of employment.

[4, 5] The City cites many cases from other jurisdictions applying this rule. No useful purpose would be served in reviewing those cases. We think the rule is, and should be, that when the employee, as an incident of his employment, accepts a ride on a means of transportation furnished by the employer, whether the means of conveyance be public or private, the case presents an exception to the going and coming rule and the employee is covered by the compensation act. But that rule is based on the theory that the means of transportation is included within, or is an incident to, the contract of employment; that is, that the employer is obligated, expressly or impliedly, to furnish it, and that it is being used as an incident of the employment at the time the injury is received. California Casualty Indemnity Exchange v. Industrial Accident Comm., supra, 21 Cal.2d 461, 132 P.2d 815; Campbell, Workmen's Compensation, Vol. 1, p. 162, § 173. That implies that the employee knows that he is entitled to ride on the transportation thus furnished, and he must, in fact, be so riding when injured. In the instant case the employee did not know that he was entitled to ride free on the city streetcars upon presentation of his badge. He so testified, and even if there is a conflict, that conflict, has been resolved in favor of plaintiff. The public, upon paying a fixed fare, likewise uses the streetcars. At the time of the accident, the employee in fact had paid his fare—the same fare paid by the general public. He was, therefore, riding as a passenger, and not as an employee.

The rule of the fire department entitling firemen to ride free was undoubtedly part of the contract of employment. But under that contract, even if plaintiff knew or should have known of its provisions, plaintiff was entitled to ride free only upon presentation of his badge. Under the evidence the employee did not comply with the conditions—he did not present his badge. Under such circumstances the employer was not required to furnish free transportation, and the employee was not entitled to a free ride. He, in fact, paid for the ride. Under such circumstances it cannot be reasonably contended that he was riding pursuant to his contract of employment or as an incident thereto. He was clearly riding the streetcar as a passenger, that is, as a member of the public, and not as an employee. That being so, he was not covered by the Workmen's Compensation Act.

Was the City prejudicially deprived of its defense that the sole proximate cause of the accident was the negligence of the truck driver and its owners?

The City contends that by the instructions of the trial court it was prejudicially deprived of one of its main defenses—that is, that the accident was proximately caused by the negligence of the truck driver in parking his vehicle in violation of the law. As already pointed out, on the motion of counsel for the truck driver and its owners, the trial court, without opposition from plaintiff or the City, granted a nonsuit to these defendants. The trial judge, during the argument, pointed out to the jury that he had granted the motion because he had become convinced that the truck driver and its owners were not negligent and were not liable for the accident. In its instructions, the court, after first pointing out that the driver of the truck and its owners originally had been parties defendant, stated: "During the course of the trial, pursuant to legal motions made by

Mr. Painter, the attorney for those defendants, they were let out of this case and are not to be considered at all in your deliberations.

"Those were legal motions made, which were to be decided by me, and I granted them. So that responsibility is solely mine. So the truck, either the owners, renters or driver, are not to be considered by you in your deliberations in this case." Then, after pointing out that the only two litigants in the case were the plaintiff and the City, the court stated: "Those are the only two parties you are to consider in your deliberations." The court refused to give certain instructions proposed by the City to the effect that if the jury should find that the truck was negligently parked, and such negligence was the proximate cause of the accident, the City should be exonerated. Of course, the jury was fully instructed to the effect that plaintiff could only recover if the jury found that the City was negligent. The City contends that there was evidence of the negligence of the truck driver, and that under these circumstances it was deprived of showing that the accident was proximately caused by such negligence, which was one of its main defenses.

[6, 7] In considering the validity of this contention certain rules of law must be kept in mind. Of course, if there was any evidence from which the jury might have found that the truck driver was negligent and that his negligence was a proximate cause of the accident, it was error to grant the nonsuit. But the plaintiff has not appealed. He is not complaining. The City, as a joint tort feasor, has no legal right to complain that another joint tort feasor was improperly exonerated from liability, there being no right of contribution between joint tort feasors. Frazzini v. Cable, 114 Cal.App. 444, 300 P. 121; Bezera v. Associated Oil Co., 117 Cal.App. 139, 3 P.2d 622; Adams v. White Bus Line, 184 Cal. 710, 195 P. 389.

[8] The City does not and cannot complain that the driver of the truck and its owners were released, even erroneously. But the City does urge that there was evidence that the truck driver was negligent. Therefore, says the City, the court's action in instructing that the negligence of the truck driver was not to be considered deprived the City of its defense that the accident was proximately caused solely by the negligence of the truck driver. The City contends that it can always urge that an accident happened solely as the result of the negligence of a third person, whether such third person is a party or not, and that to deprive it of that defense was to commit prejudicial error. Many cases are cited which undoubtedly support that general rule. Most of them seem to be cases where two moving vehicles collide and injure the plaintiff, under circumstances where either or both could be liable. Under such circumstances, to instruct erroneously that one of the persons that could have been the sole cause of the accident cannot be considered would be prejudicially erroneous and would irreparably injure the defense of the other party. Citation of authority is not necessary to establish so elementary a proposition. But for that rule to apply, the case must be one where the evidence shows not only that the negligence of two actors may have caused the accident, but also that the negligence of either one may have been the sole proximate cause. That is not the present case.

The jury has found, and the finding is supported by overwhelming evidence, that the City was negligent and that such negligence was a proximate cause of the accident. The jury was fully and fairly instructed that the City could only be held liable if the jury found that it was negligent, and also found that such negligence was a proximate cause of the accident. Assuming that the evidence shows that the truck driver was negligent and that his negligence may have been *a* proximate cause of the accident, the evidence also demonstrates not only that the City was negligent, but that its negligence, at least, was *a*, if not *the*, proximate cause of the accident. The motorman of the streetcar testified that he saw the parked truck, and stopped the streetcar; that both he and the conductor took a "sight" to see if the streetcar could pass; that it looked pretty "close" to him, that it looked "tight"; that it looked "doubtful"; that the conductor signalled him to go ahead, and that he proceeded ahead slowly; that it "still looked close"; that he stopped when the streetcar was about halfway past the truck; that he did not then look to see if the rear of the car would clear the truck, but left that up to the conductor; that the conductor signalled him to go ahead, and he proceeded ahead and was "picking up speed" when he heard a "thud" and stopped. The conductor testified that he looked at the streetcar and truck when the streetcar first stopped; that he thought the streetcar could get by; that when the streetcar stopped the truck was "pretty close to the streetcar," but he believed it would clear; that he gave the signal to go ahead; that when the motorman stopped the second time he looked again, opening the doors for this purpose; that he still believed the streetcar would clear, and so signalled the motorman to proceed; that he did not keep a lookout but closed the doors and turned around to his fare box and was winding it up when he heard the crash.

[9] Thus, we have an unoccupied, nonmoving parked truck. We have a moving streetcar. We have a passenger—the plaintiff—to whom the highest degree of care was owed. We have a motorman and conductor both aware of the danger but who negligently misjudge the distance, and plaintiff is injured as a result. The negligence of the City is obvious. The finding of the jury that the City was negligent is not only supported, but it is doubtful if a contrary finding would be supported by any substantial evidence at all. If it be assumed that the truck driver was also negligent, since the truck was parked and at no time moved prior to the accident, it is obvious that a finding that the assumed negligence of the truck driver was *the* proximate cause of the accident, and that the demonstrated negligence of the City was not *a* proximate cause of the accident as a matter of law, would not be supported by the record. In other words, even if it be assumed that the truck driver was negligent, since the truck was not moving and the streetcar was, and since the streetcar operators were clearly negligent, the most the jury could have found would have been that the negligence of both the City and the truck driver caused the accident, that is, that their respective acts of negligence were concurrent causes of the accident. Since the City was clearly negligent, there is no rational interpretation of the evidence that would support any other conclusion but that such negligence was at least *a* proximate cause of the accident. While the truck driver, if negligent, might contend, and the jury might have found, that the intervening act of negligence of the City broke the chain of causation, and that such negligence was the proximate cause of the accident, the City reasonably can make no such contention. Under the facts if the City was negligent, and the evidence is overwhelming that it was, such negligence, as a matter of law, was at least a concurrent cause. This being so, even if the nonsuit as to the driver and owners of the truck was erroneously granted the City was not prejudiced, since one joint tort feasor has no legal cause for complaint if another tort feasor is relieved of liability, even erroneously, there being no right of contribution between them.

This is a complete answer to every contention made by the City on this point.

The above discussion has assumed that the truck was parked in violation of the law, and that, therefore, the nonsuit as to the driver and owners of the truck was erroneous. As we have seen, even with that assumption, the City has not been legally injured. Of course, if, as a matter of law, the truck driver was not negligent, and therefore the nonsuit was proper, then the City has no cause for complaint at all.

The City contends that there was evidence from which the jury could have found that the truck was parked in violation of the law. This contention is probably correct, although the evidence on this issue is very slight indeed.

Section 588 of the Vehicle Code provides: "(a) Except as otherwise provided in this section every vehicle stopped or parked upon a roadway where there are adjacent curbs shall be so stopped or parked with the right-hand wheels of such vehicle parallel with and within 18 inches of the right-hand curb. * * * This paragraph shall not apply to a commercial vehicle when loading or unloading merchandise or passengers."

Wilkinson, the driver of the truck, testified that he had driven the truck to Fillmore Street so that he could help some fellow employees load a clothes press into another waiting truck. He drove head on into the parking place, the front wheel going up on the curb and down again. There is no doubt that the front wheels were closer to the curb than the back wheels. Wilkinson testified that the right front wheel was five or six inches from the curb, and the outer of the right back wheels (dual tires) was possibly twelve inches from the curb. He had fixed this distance as about sixteen inches when his deposition was taken. The City makes an argument based upon the evidence as to the distance between the car tracks, the distance from the west track to the west curb, the width of the street, the maximum overhang of the streetcar, the width of the truck, and contends that such measurements demonstrate that the truck was parked more than eighteen inches from the curb, but apparently no one saw fit to measure the overhang of the truck over its wheels—a most pertinent factor in making the computation desired by the City. The truck was moved very shortly after the accident, so that no accurate measurements seem available. One witness, whose story about the accident differed radically from all other witnesses, did testify that the truck, when parked was "two—two and a half feet away from the sidewalk."

Thus there was probably evidence, weak evidence but some evidence, that the truck was parked in violation of the law. Thus, the nonsuit should not have been granted in favor of the driver and owners of the truck. But, as already pointed out, the City cannot complain of this error, and the plaintiff has not appealed.

The Amount of the Verdict.

The third group of errors asserted by the City center around the contention that the award of $125,000 is excessive as a matter of law, and that prejudicial error occurred during the trial relative to the issue of damages.

[10, 11] Counsel on both sides devote a large portion of their briefs to a consideration of the question as to whether or not the damages are excessive as a matter of law. Many cases from other jurisdictions and from California are exhaustively discussed and commented upon. Each case, of course, must turn upon its own facts. While $125,000 is a large sum of money, and while it perhaps represents the largest verdict that has heretofore come before an appellate court in this state, those facts are not conclusive. The jury has fixed this amount as the damages suffered by plaintiff. The trial judge has impliedly approved the award by denying the motion for a new trial. We may interfere only if it appears, as a matter of law, that the award was the result of passion or prejudice. In the instant case we cannot so hold. We have so recently reviewed this same question of law in Gluckstein v. Lipsett, 93 Cal.App.2d 391, 209 P.2d 98, hearing in Supreme Court denied, that it is unnecessary to do any more than quote from that case. At page 524 of 93 Cal.App.2d, at page 104 of 209 P.2d we stated: "The test to be applied in cases where it is contended that the damages awarded are excessive was stated by us in Buswell v. City & County of San Francisco, 89 Cal.App.2d 123 (p. 127), 200 P.2d 115, 117, to be 'a comparison of the amount of the verdict with the evidence before the trial court.' Taking into consideration the disfigurement, the humiliation, the pain and the malignancy, we cannot say that the award of $115,000, large as it is, is so far out of line as to show passion and prejudice on the part of the jury. It is not a question of what we would award, Nason v. Leth-Nissen, 82 Cal.App.2d 70, 185 P.2d 880, but whether we can hold that it indicates that type of action by the jury. 'Generally speaking, * * * if there is substantial evidence in the record supporting the damages awarded by the jury and it is inferentially approved by the trial judge by his denial of a motion for new trial without reducing the damages, we are powerless to reduce them or to hold the award excessive.' Holmes v. Southern Cal. Edison Co., 78 Cal.App.2d 43, 52, 177 P.2d 32, 37. In considering the amount of the verdict, we must bear in mind the present day situation as expressed in Kircher v. Atchison, T. & S. F. Ry. Co., 32 Cal.2d 176, 187, 195 P.2d 427, 434: 'It is a matter of common knowledge, and of which judicial notice may be taken, that the purchasing power of the dollar has decreased to approximately one half what it was prior to the present inflationary spiral (Citing cases). * * *'"

When these rules are applied to the facts of this case it is abundantly clear that this is not a case in which it can be held that the verdict is excessive, as a matter of law.

The injuries are severe, permanent and painful. The record shows the following: At the time of the accident plaintiff was 21 years of age. The average life expectancy of a male of 21 is 44 years. He was earning $260 a month in the Fire Department, and hoped to work for that department the rest of his life. He was in good health, and had just passed the Fire Department physical examination. He had been married in April of 1947, and was living with his wife. She had become pregnant just before the accident and the baby was born in May of 1948. In the accident his entire pelvic region was crushed. He sustained four comminuted fractures of the pelvis and a fracture of the transverse process of the fifth lumbar vertebra. The pelvic bones are permanently displaced. At the time of trial (July, 1948) he still suffered from backache and had difficulty in walking. His doctor testified that it was reasonably certain that he would have a backache the rest of his life. Arthritis will probably develop. He has had severe headaches since the accident. He had a deep wound of the thigh. He suffered a rent around the neck of the bladder, which was sutured. He suffered a ruptured urethra, which was sutured. He has a scar tissue stricture at the site of this rupture which causes him trouble in urinating, he being unable completely to empty the bladder. He is required to urinate 11 or 12 times a day, and 7 or 8 times every night. No operation can cure the urethral stricture, and it is necessary to pass a sound through the urethra and into the bladder every ten days in order to empty the bladder by stretching the scar tissues. This will have to continue at such intervals the balance of the patient's life, there being no other known treatment. If it is not performed the patient will die. This operation is quite painful, is performed under local anaesthetic, and usually causes bleeding. Plaintiff is highly nervous before the dilations, is in a cold sweat at the start, and in a worse condition afterwards. As a result of the dilations plaintiff has a mild chronic prostatitis, with increase in size of the prostate, which is unusual in a young man. Plaintiff can never again do any hard work, but will be able to do light work. He had done no work up to the time of trial.

As a result of the accident plaintiff was confined to the hospital for three months. Thereafter, he remained in bed at home for one month and has since been ambulatory. He had three severe operations performed under general anaesthetic. Four blood transfusions were required to save his life. He has been required to return to the hospital on two occasions for three-day intervals, once for a urethral dilation and once for cystoscopy.

Before the accident plaintiff weighed 185 pounds. Afterwards, he went down to 140, and at the time of trial weighed 168 pounds.

It is reasonably probable that, as a result of the accident, plaintiff will be impotent the rest of his life. Before the accident he had led a normal family life, but since that time has had no desire for sexual intercourse. Impotence "is a very common complication with rupture of the urethra." There is evidence the impotency "probably" will be permanent, and that it "frequently" follows this type of injury.

There is substantial evidence that he has developed a definite psychoneurosis as a result of the accident which will increase as time goes on, and may result in a breakdown.

The special damages suffered by plaintiff total $25,000. They were loss of wages to time of trial—$3,000; hospital bills—$3,000; doctors' bills—$4,000; prospective future medical expense reasonably certain to occur—$15,000. Thus, $100,000 of the judgment was awarded to compensate for the injuries, for the pain and suffering, and for the loss of earning power. Under the rules of law heretofore mentioned we cannot hold that such an award, for such injuries and damage, is excessive, as a matter of law.

Other Points Relating to the Issue of Damages.

1. *Hypothetical Question.*

The City next objects to a portion of a hypothetical question asked by counsel for plaintiff of Dr. Catton, in which counsel assumed, allegedly without foundation in the evidence, that plaintiff would be impotent for the rest of his life. The record shows the following:

"Q. [Mr. Belli] * * * Assuming also, Doctor, with the rupture of the prostatic urethra membrane near the neck of the bladder, he has become impotent, that he will remain impotent, not sterile, but impotent for the rest of his life. He knows he is presently impotent.

"Mr. Bergerot. [For defendant]: Just a moment. At that point, I think it is an improper question, and that he will remain impotent it is something not in evidence, he will remain impotent for the rest of his life.

"Mr. Belli: I think that is the state of the record.

"The Court: I will overrule the objection.

"Mr. Belli: Q. Assuming, Doctor, he knows he will remain impotent for the rest of his life, and assume further that as far as we can determine presently as to his mental condition, before the accident he was a normal boy, * * *"

The record shows that Dr. Catton's answer to this question was, in part, based on the assumption contained in the question.

Plaintiff testified that prior to the accident his sex life had been normal, but that since the accident he had had no desire for intercourse. There was evidence that plaintiff feared impotency. The doctors testified that it was reasonably probable that plaintiff would be impotent—that impotency is a "very common complication" following such an injury; that the existing impotency "probably" will be permanent and "frequently" follows such an injury. Although there is some testimony to the contrary, it is a reasonable inference from the testimony of plaintiff's doctors that the probability of permanent impotency was great.

[12-14] A hypothetical question should be based upon the facts shown by the evidence. Snow v. Harris, 41 Cal.App. 34, 37, 181 P. 676; Coonan v. Loewenthal, 129 Cal. 197, 202, 61 P. 940; Rowe v. Such, 134 Cal. 573, 576, 66 P. 862, 67 P. 760. While there is no direct testimony that the impotency would positively be permanent, the plaintiff did testify that he was then in fact impotent and the doctors were reasonably certain such conditions would be permanent. It is a reasonable inference from the evidence that the impotency will be permanent. A party is entitled to base his hypothetical question on any reasonable inference from the evidence, it being for the jury to decide whether such inference is sound. Thus, there was some evidence upon which the hypothetical question was based. The question was a proper one.

2. *Propriety of Instruction on Life Expectancy.*

At plaintiff's request the jury was instructed that plaintiff's life expectancy was 44 years. The instruction reads as follows:

"According to the 1937 Standard Annuity Table of mortality, the expectancy of life of one aged 22 years is 44 years.

"This fact, of which the Court takes judicial notice, is now in evidence to be considered by you in arriving at the amount of damages, if you find that plaintiff, Frank R. Sullivan, Jr., [is] entitled to a verdict."

The record shows that the City offered no qualifying instruction, but nevertheless it contends that the court, on its own motion, should have qualified the proffered instruction with language to the effect that life expectancy as shown by the mortality tables is a mere average based on a limited record of experience, that the inference based on such tables only applies to one who is in average health, and that the jury must consider not only the mortality tables but all the evidence bearing on the same issue.

[15] There is no doubt but that such a qualification, had it been given, would have been proper, but it does not follow that failure to give it, at least where not suggested by the complaining party, is error. Thus, in Murphy v. National Ice Cream Co., 114 Cal.App. 482, 300 p. 91, the trial court gave the same type of instruction here involved. After first holding that the form of the instruction was subject to criticism the appellate court stated, 114 Cal. App. page 487, 300 P. page 93: "However, it does not follow for several reasons that a reversal is warranted on that ground, for in the first place it is held generally that in the absence of a request for more specific instructions it is not reversible error for the court to instruct the jury that life tables might be considered as evidence of the life expectancy of a person, without instructing further that it should take into account in this respect all the evidence relating to the health and physical condition of such person. [Citing many cases.] And in the present case, no such request was made, nor was any instruction whatever proposed by defendants upon the subject."

The court also pointed out that the fact that no individual's life is capable of definite computation is such a matter of common knowledge that the jury could not possibly have been misled.

In discussing the identical point under discussion the court in Newman v. Campbell, 23 Cal.App.2d 639, 641, 73 P.2d 1265, 1266, stated: "The mortality table was admissible and, although not conclusive, was evidence of the probable duration of her life. Under the evidence she was entitled to an instruction based upon her theory of the case. Groat v. Walkup Drayage, etc., Co., 14 Cal.App.2d 350, 58 P.2d 200; Morrow v. Mendleson, 15 Cal.App.2d 15, 58 P. 2d 1302. If the appellant desired an instruction explaining in more detail the weight to be given the elements fixing her life expectancy, as was the case in Groat v. Walkup Drayage, etc., Co., supra, such an instruction should have been offered. This was not done, and in the circumstances appellant has no ground for complaint. Murphy v. National Ice Cream Co., 114 Cal. App. 482, 300 p. 91." See, also, Christiansen v. Hollings, 44 Cal.App.2d 332, 341, 112 P.2d 723.

It is quite clear that, under the circumstances, no error was committed in giving the challenged instruction without the limitation.

3. *Remarks of Trial Judge.*

[16] In a somewhat far fetched attempt to upset the verdict, the City complains of a remark by the trial judge made during argument of the cause. Counsel for plaintiff, in arguing what the amount of plaintiff's prospective damage might be, pointed out that even if plaintiff's earning power was only reduced $150 a month, that for 44 years that amounted to $66,000. The trial judge interrupted him and stated: "You have also made a mistake in your mathematics. I think if you take 44 times 150 you will get the sum $79,200 instead of $66,000 * * * 44 times 1800 a year, * * * comes to 79,200."

Contrary to the contention of the City, there was no suggestion by the trial judge that this was the sum that the jury should allow to compensate for loss of plaintiff's wages. The trial judge was merely correcting an erroneous computation made by counsel. This he had power to do.

4. *The Point in Reference to the Amount of the Claim.*

[17] As already pointed out, the claim filed by the plaintiff with the City—filed while he was still in the hospital—was for $50,000. Plaintiff then filed a complaint for $50,000, and thereafter, by motion, sought permission, which was granted, to file a second amended complaint in which the demand was increased to $150,000. The City contends that plaintiff is limited to the amount set forth in the original claim.

The contention lacks merit. While the filing of a claim is mandatory in such cases, literal compliance with the claim statute is not required—substantial compliance is sufficient. Coan v. City of Los Angeles, 70 Cal.App. 752, 766, 234 P. 426; Knight v. City of Los Angeles, 26 Cal.2d 764, 160 P.2d 779; Perry v. City of San Diego, 80 Cal. App.2d 166, 181 P.2d 98.

It seems too clear to require extended argument that, in a proper case, an injured person should not be limited arbitrarily to the amount of his claim. Such claims must be filed within a very short time after the accident. Many times, as in the instant case, the claim must be filed while the injured person is still in the hospital and before the extent of his injuries is known. If it were held that the injured person is absolutely limited to the amount of his claim filed before the injuries caused by the governmental agency have been definitely ascertained, grave injustices would necessarily result, as the instant case demonstrates. Moreover, it would result in lawyers always filing excessive claims, out of an abundance of caution, and thus tend to prevent the settlement of such claims—one of the major reasons for the requirement of filing the claim.

While we have been referred to no California case dealing with the precise point, there is fortunately no lack of authority from other jurisdictions. The point is discussed in an annotation in 75 A.L.R. 1511 entitled "Amount of damages named in notice of claim against municipality as limiting amount of recovery." It is there stated: "Although there are some cases in which a contrary conclusion has been reached, it has been generally held, both under statutes providing that a notice or claim for damages must be presented to municipal authorities in order that recovery may be had and apart from such statutes, that the amount claimed in the petition or notice does not necessarily limit or control the amount which may be recovered in an action to enforce the claim. It will be seen that this view has been taken even under statutes which require that the notice state the amount claimed." Cases supporting this view are cited from Georgia, Kansas, Michigan, Minnesota, New Hampshire, New York, Oklahoma, Rhode Island, Utah, Washington and Canada.

This view is sound. The claim provision is primarily aimed at permitting the governmental agency, at an early date, and before witnesses have disappeared, to investigate the facts and, if possible, to settle the controversy. The investigation having been made, and the claim rejected, suit may be filed, as in any case, for the total amount of damage. There was no error in permitting the amendment.

The record demonstrates that the case was fairly tried, the jury was fully and fairly instructed, and that no prejudicial error occurred during the trial.

The judgment appealed from is affirmed.

WARD and BRAY, JJ., concur.

Hearing denied; SHENK, J., dissenting.

95 Cal.App.2d 877

SMITH et al. v. BAKER et al.

Civ. 4123.

District Court of Appeal, Fourth District, California.

Feb. 4, 1950.

Hearing Denied March 30, 1950.

Action by Orie P. Smith and Edith P. Smith, purchasers, against Walter L. Baker and Manda J. Baker, vendors, for ejectment, injunction and damages.

The Superior Court of Riverside County, William D. Dehy, Judge Assigned, entered judgment for plaintiffs, and defendants appealed.

The District Court of Appeal, Griffin, J., held that written agreement, separate from deed, reserving title to crop on land in vendors was enforceable, notwithstanding deed did not contain reservation, that vendors were entitled to proceeds from crop, and that evidence offered by purchasers was insufficient to establish a forfeiture.

Judgment reversed.

1. Crops 🔑5

There must be a written reservation to reserve growing crops to a vendor when realty is conveyed, and in absence of a written reservation, a growing crop passes with realty.

2. Deeds 🔑94

The execution of a deed to realty without any reservation in it, merges all prior negotiations and agreements relating thereto.

3. Crops 🔑6

Where written agreement to purchase realty contained a reservation to vendors of crops growing on deeded realty written reservation, as between parties, was effective notwithstanding reservation was not incorporated in deed.

4. Crops 🔑6

Under statute providing that for purpose of sale, industrial growing crops which are agreed to be severed before sale, shall be treated as goods, and governed by provisions of code regulating sale of goods, growing crops are subject to reservation upon sale of realty. Civ. Code, §§ 658, 660.

5. Contracts 🔑318

Under statute providing that a condition involving a forfeiture must be strictly interpreted against party for whose benefit it is created, rule will be given full application, and burden will be placed upon party claiming forfeiture to show that forfeiture was unmistakable intention of instrument. Civ. Code, § 1442.

6. Contracts 🔑318

Forfeitures are not favored by courts and are never enforced if they are couched in ambiguous terms, and court has duty under statute to avoid a forfeiture if agreement can be so interpreted. Civ. Code, § 1442.

7. Crops 🔑6

Where written escrow agreement between purchasers and vendors provided lettuce crop on realty was to belong to vendors, and that vendors were to remain in possession to harvest crop until April 30, 1948, when right to possession of property terminated, but deed to realty contained neither provision nor any provision for forfeiture, and crop did not mature on that date, vendors intended to retain a portion of premises to that date, and would be entitled to proceeds from sale of crop.

8. Vendor and purchaser 🔑343(1)

Where written escrow agreement provided that lettuce crop on realty was to belong to vendors, and that vendors were to remain in possession until April 30, 1948, to harvest crop, but crop did not mature on that date, and trial court found that vendors constructively retained a portion of the realty in their possession until May 21, 1948, purchasers would be entitled to damages for retention of realty by vendors for three weeks after April 30.

Courtney Lacey and Mart Coles, Hemet, for appellants.

Gerald A. Coxe, Los Angeles, for respondents.

GRIFFIN, Justice.

Plaintiffs brought this action against defendants entitled "Complaint in Ejectment and for Injunction and Damages". Defendants and appellants owned a ranch near San Jacinto. In December, 1947, they planted a crop of lettuce on 15 acres of said ranch property. On December 22, 1947, they entered into an agreement with a produce concern which was to harvest the lettuce and sell it when it was ready for cutting. The ranch was listed for sale. On February 2, 1948, a real estate broker secured from plaintiff Orie P. Smith a written agreement to purchase the ranch property then owned by the defendants for the sum of $18,500. The agreement provides for the sale of the entire property "except lettuce crop to go to owner consisting of (15 acres)". On February 6, 1948, plaintiffs and defendants entered into an escrow agreement. This agreement, among other things, provided that "The seller is allowed to retain possession of the property until 4-30-48 and retain their interest in the crop now on the property, being a crop of lettuce." At the same time the defendants signed the escrow agreement they also signed a deed to the property dated February 6, 1948, and left it with the escrow clerk to be recorded in due course and delivered to plaintiffs. It was recorded on March 25, 1948, and made no mention of the reservation of the lettuce crop. Defendants were in possession of the entire property under the agreement and shortly before April 30, 1948, they discovered that they were unable to harvest and remove their lettuce crop by that date because of the fact that the crop had not matured. A few days before April 30, defendants moved out of the house located on the premises and on April 29 gave written notice to plaintiffs that they intended to remove the crop of lettuce then growing upon the property and notified them that they should refrain from in any way interfering with or attempting to handle the said crop. About May 12 the produce concern started harvesting the crop and completed it about May 21. On May 3 plaintiffs filed this action praying for the immediate possession of all of the premises, growing crops and personal property situated thereon, for damages for unlawful withholding and use of the premises from April 30 to the date of placing plaintiffs into peaceable possession, and asking that the court determine the ownership of the crop of lettuce then growing on the premises and damages for removal of the same in the event that the ownership be ultimately determined to be in the plaintiffs. A temporary restraining order was sought and obtained, restraining defendants from removing any portion of the lettuce crop for any purpose and from trespassing upon the property. After issuance of the restraining order the respective counsel entered into a stipulation agreeing that defendants may go upon the land described and remove the lettuce crop then growing on the land; that they may use water, pumps and conduits then located on the real property for making necessary and proper irrigation of the lettuce crop, and agreeing that the purpose of the stipulation was to conserve and protect the interests of all parties concerned; that the produce concern may harvest the crop and deliver the proceeds to the court pending the determination of the action. The sum of $4037.55 was thus deposited.

The only question here involved is as to which party is entitled to the proceeds of the sale of the lettuce crop.

The trial court took evidence surrounding the entire transaction and found generally that defendants vacated and turned over to plaintiffs a portion of the premises on April 28, 1948; that the escrow agreement provided that the sellers were to retain possession until April 30, for the purpose of harvesting a certain crop of lettuce growing on the land; and then specifically found "that the parties understood and agreed that in the event that the sellers did not for any reason succeed in harvesting said crop of lettuce on or before the said 30 day of April, 1948, that the same would then automatically under the terms and conditions of said agreement, become the property of, and that title to said crop of lettuce would pass to the purchasers of the realty, the plaintiffs herein"; that the defendants did not harvest the crop on or before the agreed date; that about March 25, 1948, defendants accepted from the plaintiffs the full amount of the purchase price and delivered their unrestricted deed to the realty to the plaintiffs; that by reason of defendants "holding over" after April 30 and until May 21, of a portion of the property plaintiffs were thereby prevented from planting a new crop in season; that defendants, in vacating a portion of the premises, took and removed certain scrap iron and various articles of personal property amounting to approximately $165; that defendants did not notify plaintiffs that the lettuce crop had been previously sold by defendants until about April 29; that the defendants, by their own agreement, had no right, title or interest in the crop of lettuce after the 30th of April, 1948, and that plaintiffs were entitled to the proceeds thereof; that such award of proceeds from the sale of the crop of lettuce was adequate compensation and that therefore plaintiffs were not entitled to damages against the defendants resulting from their "holding over" and retention of the premises after April 29. Judgment was entered accordingly. Defendants appeal, and claim that the court erred in thus construing the provisions of the escrow agreement and the evidence surrounding the entire transaction.

The trial court, without objection, proceeded to hear evidence bearing on the interpretation of the provisions of the escrow agreement regarding the retention of the lettuce crop and forfeiture of it, apparently, on the theory that the agreement was uncertain and ambiguous.

The evidence on this question was as follows: The real estate broker testified generally that the agreement was that the escrow would be closed as soon as all of the money was deposited; that plaintiffs were not able to be there at the opening of the escrow but the agreement was drawn up by the escrow clerk and they all thought and decided that defendants should have possession of the entire property until April 30, and that the lettuce crop would be harvested by that time. He was asked if anything was said about the crop belonging to the buyer if defendants "didn't get it off" by that time. He answered "No". He then testified that the escrow agent thought she could have the escrow completed within thirty days but she suggested that she be allowed 40 days within which to close the escrow; that before entering into the agreement he told defendants that the lettuce crop was reserved to them.

The escrow agent testified that when writing up the escrow instructions, Mr. Baker stated that he was selling his property; that he had no place to move and wanted to remain on the property until April 30 and that he wished to keep the lettuce crop; that he hoped to have it off by April 30; that she never told the Bakers that if they did not have the crop off by April 30 it would belong to the buyer; that the Smiths later signed the agreement but not in her presence. She then stated that shortly before April 30, Mrs. Baker came to her, worried about the lettuce crop and said that due to weather conditions it did not mature as early as they expected and that the plaintiffs expressed their intention to declare the lettuce crop forfeited to them; that Mrs. Baker asked her advice and she told her to see the plaintiffs and see if they could not adjust the matter some way; that she further advised her that she should move out of the house and give possession of it to the plaintiffs according to the agreement.

Defendant Walter L. Baker and his wife testified generally that it was their understanding that they were to keep the lettuce crop and that it was "reserved" to them and was to be harvested as soon as it could be; that no one could tell when it would ripen; that the limitation placed in the escrow agreement only involved the time when they were to move out of the house; that the date was proposed by the escrow clerk; that defendant and his family worked hard in irrigating and weeding the lettuce crop; that he had never planted lettuce before and knew nothing about the time it would or should take to ripen.

The testimony of plaintiff Orie P. Smith is that it was his understanding that he was to have possession of all of the property, including the lettuce crop, by April 30; that he discussed this fact with the escrow agent who told him that April 30 was the "dead line" and that after that he was to have possession of everything; that he discussed it with defendants and that defendants told him they had had hard luck in getting the lettuce crop to mature; that he told them he could not be expected to "carry their hard luck" and if he did not get his land he "would have to have something for it"; that he could not put in his crop of watermelons in time for them to mature so he "should have the lettuce which they agreed to"; that defendants offered to pay him as high as $200 damages for holding over after the 30th; that he estimated his loss of profits on the watermelon crop to be $6200; and that he would not have purchased the property if he had known he was not going to have the use of the full acreage by April 30; that it was his understanding, at the time of the escrow, that if the crop was not off of the land by that time it would belong to him as a "penalty" for "them hanging over".

[1, 2] In support of the court's findings plaintiffs rely upon this testimony as well as the holding in Sweet v. Watson's Nur-

sery, 33 Cal.App.2d 699, 92 P.2d 812, to the effect that to reserve growing crops to a vendor when realty is conveyed, there must be a written reservation, and in the absence of such a written reservation a growing crop passes with the realty. It is further claimed that the execution of the deed without any reservation in it merges all prior negotiations and agreements relating thereto, citing such cases as Werner v. Graham, 181 Cal. 174, 183 P. 945; Riley v. North Star Mining Co., 152 Cal. 549, 93 P. 194; Huerstal v. Muir, 64 Cal. 450, 2 P. 33; and 8 Cal.Jur. p. 691, sec. 8.

[3] Sweet v. Watson's Nursery, supra, is not applicable, because in the instant action there is a written reservation of crops growing on the deeded land. Such written reservation, as between the parties, is not required to be in the deed itself. Densmore v. Chainey, 7 Cal.App.2d 109, 45 P.2d 406; Chainey v. Shostrom, 119 Cal.App. 237, 6 P.2d 353; Campbell v. Miller, 205 Cal. 22, 25, 269 P. 536; Tuso v. Green, 194 Cal. 574, 581, 229 P. 327, and Quality Bldg. & Sec. Co. v. Bledsoe, 125 Cal.App. 493, 500, 14 P.2d 128.

[4] There is no doubt that the right to the use and occupation of the entire premises by defendants was given by plaintiffs under the escrow agreement, at least until April 30, and that the right to harvest the lettuce crop, up to that date, remained in defendants. The lettuce crop, by the agreement, had been severed from the realty, and title thereto was reserved in defendants unless forfeited by the terms of the agreement. Under sec. 658 of the Civil Code, for the purpose of sale, industrial growing crops, which are agreed to be severed before sale, shall be treated as goods and be governed by the provisions of the title of the Civil Code regulating the sale of goods. (See, also, sec. 660, Civ. Code.) Since growing crops are subject to absolute sale, it would follow that they are subject to reservation upon the sale of the land. Sears v. Ackerman, 138 Cal. 583, 72 P. 171; Vulicevich v. Skinner, 77 Cal. 239, 19 P. 424; Jones v. California Growers & Shippers, 182 Cal. 777, 190 P. 172.

The finding that the plaintiffs were entitled to the lettuce crop could be supported only upon the theory that title thereto in defendants had been forfeited to plaintiffs by reason of some breach of a written agreement. The escrow agreement between the parties makes no provision for forfeiture of title to the lettuce crop to plaintiffs by reason of defendants' failure to harvest it before April 30 or, in fact, after April 30. By its terms it only provides that after April 30 plaintiffs shall be entitled to the possession of the premises.

The evidence clearly indicates that a forfeiture of the lettuce crop, for failure to harvest and remove it from the premises prior to April 30, was not intended by defendants or by the parties responsible for the authorship of the agreement. The terms of the agreement itself are equally convincing.

In construing the evidence presented in connection with the written agreement, we are at once met with the code provision which provides that: "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." (Sec. 1442, Civil Code.)

[5, 6] In McNeece v. Wood, 204 Cal. 280, at pages 283-284, 267 P. 877, 879, the court, in construing that section, states:

> "Examination of the cases in this state shows that our courts have not hesitated to give this rule of interpretation full application. 'Forfeitures, as such, are not favored by the courts, and are never enforced if they are couched in ambiguous terms.' * * * 'A forfeiture can be enforced only when there is "such a breach shown as it was the clear and manifest intention of the parties to provide for."' * * * 'The burden is upon the party claiming the forfeiture to show that such was the unmistakable intention of the instrument. If the agreement can be reasonably interpreted so as to avoid the forfeiture, it is our duty to do so.'" (Citing cases.)

To the same effect is Brant v. Bigler, 92 Cal.App.2d 730, 208 P.2d 47, 49, where it is said, quoting from Ballard v. MacCallum, 15 Cal.2d 439, 441, 101 P.2d 692:

"'We have two possible constructions, one of which leads to a forfeiture and the other avoids it. In such a case the policy and rule are settled, both in the interpretation of ordinary contracts and instruments transferring property, that the construction which avoids forfeiture must be made if it is at all possible. (Citing cases.)'"

In Blaeholder v. Guthrie, 17 Cal.App. 297, 119 P. 524, it was held that a contract should not be so interpreted that the tiller of the soil and the person who raises the crop, *while in possession of the property*, should lose the benefit of his labor.

[7, 8] We must therefore conclude that the burden of establishing, by convincing evidence, that a forfeiture was thus intended by the parties, has not been met by plaintiffs. The clause of the escrow agreement provides that the right to the possession of the *property*, whatever that word was intended to cover, terminated on April 30. The only property described in the escrow was lots 13 and 14 and the south half of lot 11. Under the deed and the agreement this was the subject matter under discussion and the only reasonable conclusion would be that this was the property, possession of which was to terminate on April 30 under the clause mentioned. It should be here noted that at all times, defendants were claiming possession and right of possession of the 15 acres for the purpose of irrigating, cultivating, and harvesting the crop thereon up until the actual time it was harvested. The complaint alleges that defendants "surrendered and delivered to plaintiffs herein only a portion of the premises purchased" and that on April 30 defendants notified plaintiffs that they intended to *"retain possession* of a portion of said premises * * * on which is situated a growing crop of lettuce * *" The trial court found that defendants constructively retained a portion of the land in their *possession* until may 21, 1948. If plaintiffs were entitled to possession of the real property described in the escrow, they might be entitled to maintain their action in ejectment to recover possession thereof and also obtain *damages,* if any, under the proper measure, for its retention for the three weeks after April 30. This form of relief is indicated by the title of the complaint here filed. Grossman v. Yip Wing, 62 Cal.App. 121, 216 P. 634; Page v. Fowler, 39 Cal. 412, 2 Am.Rep. 462; Johnston v. Fish, 105 Cal. 420, 38 P. 979, 45 Am.St. Rep. 53; Ebbert v. Mercantile Trust Co., 213 Cal. 496, 2 P.2d 776.

Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.

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95 Cal.App.2d 862

ST. GERMAIN v. WATSON et al.

Civ. 14193.

District Court of Appeal, First District,
Division 1, California.

Feb. 3, 1950.

Rehearing Denied March 4, 1950.

Hearing Denied April 3, 1950.

Eugene Albert de St. Germain, doing business under the firm name of St. Germain & Company, brought a mandamus proceeding to compel D. D. Watson, state real estate commissioner and his assistant commissioner, to vacate a suspension of petitioner's license as a real estate broker.

From a judgment of the Superior Court in and for the City and County of San Francisco, Milton S. Sapiro, J., vacating the suspension, respondents appealed.

The District Court of Appeal, Bray, J., held that petitioner violated the Real Estate Law by accepting a nonnegotiable note, instead of cash, as a down payment on the purchase price of realty, without informing the seller of such fact.

Judgment reversed.

Ward, J., dissented.

1. Customs and usages 🔑19(3)

In mandamus proceeding to compel state real estate commissioner to vacate suspension of petitioner's real estate broker's license because of his acceptance of nonnegotiable note as down payment on purchase price of realty, without disclosing such fact to seller, evidence did not support Superior Court's finding of custom in real estate profession to accept such notes as payments in real estate transactions without disclosing such facts to principals. Business and Professions Code, § 10176 (a, i).

2. Customs and usages ⚷5

A custom in profession is not proved by acts of one individual engaged therein, but by practices of persons in such profession generally.

3. Brokers ⚷4

A real estate broker, accepting nonnegotiable note as down payment on purchase price of realty, without informing seller, who was broker's client, of such fact, violated Real Estate Law, though he acted in good faith, not in intentionally fraudulent or dishonest manner. Business and Professions Code, § 10176(a, i).

4. Evidence ⚷20(1)

That considerable number of persons were carrying on real estate business in unethical manner before enactment of Real Estate Law and that one purpose thereof was to raise standards of such profession and require its members to act fairly and ethically with their clients are well known facts. Business and Professions Code, § 10000 et seq.

5. Bills and notes ⚷28

A bank "check" differs from "note" in that person giving check represents that he has money in bank to cover check and that bank will pay amount called for and his failure to have money in bank may constitute a crime, while one executing note, though payable on demand, makes no such representation and failure to pay note when presented is not a crime, and checks are universally accepted as money in modern business, but promissory notes are not. Pen.Code, § 476a.

6. Brokers ⚷19

The law imposes on real estate agent same obligation of undivided service and loyalty to his principal that is imposed on trustee in his beneficiary's favor, and violation of such agent's trust is subject to same punitory consequences as those provided for a disloyal or recreant trustee.

7. Brokers ⚷19

A real estate agent is charged with duty to make fullest disclosure to his principal of all material facts which might affect principal's decision in transaction involved.

8. Brokers ⚷4

The fact that real estate broker received no advantage from his failure to disclose to his client broker's acceptance of nonnegotiable note as down payment on purchase price of realty sold by client did not show that broker did not violate Real Estate Law, which does not make the securing the advantage an element of violation thereof. Business and Professions Code, § 10176(a, i).

9. Brokers ⚷3

The Real Estate Law, authorizing state real estate commissioner to suspend or revoke license of real estate broker making any substantial misrepresentation or guilty of fraud or dishonest dealing, need not be amended to prohibit broker's acceptance of note as down payment on purchase price of realty without divulging such fact to seller, nor must commissioner promulgate regulation prohibiting such action, in order to render it a violation of such law. Business and Professions Code, § 10176(a, i).

◆

Fred N. Howser, Atty. Gen., R. L. Chamberlain, Deputy Atty. Gen., Richard H. Perry, Deputy Atty. Gen., for appellant.

Christin, Keegan & Carroll, San Francisco, for petitioner and respondent.

BRAY, Justice.

Appellant Real Estate Commissioner of the State of California, suspended, for a period of 15 days, respondent's license to engage in business as a real estate broker. In a mandamus proceeding brought in the superior court, a judgment was entered vacating that suspension. From that judgment the commissioner has appealed on the judgment roll alone.

Question Presented.

The main question presented is whether the acceptance by a real estate broker of a nonnegotiable promissory note as the down payment on an agreement to purchase real property without informing the seller, who is the broker's client, of that fact, constitutes a violation of section 10176, subdivisions (a) and (i) (formerly subdivision (f), Division 4, Business and Professions Code.[1]

Facts.

There is practically no dispute as to the facts. A transcript of the proceedings before the commissioner was incorporated in the return to the petition for the writ of mandate, and hence is a part of the judgment roll. The court considered the matter as a trial "de novo" and reviewed the transcript. No additional evidence was offered. A fair summary of the facts follows:

Respondent has been in the real estate business in San Francisco for many years. In May of 1948 he spoke to a Mr. Zimmerman about selling a portion of the latter's property for him. Zimmerman (hereafter called the seller) orally agreed that respondent could look for buyers for the property.

On June 4, the seller received a call from respondent that respondent was coming over to see him, and had obtained a buyer for the property. Respondent arrived, and produced a uniform agreement of sale and deposit receipt, dated June 2, 1948. The deposit receipt read in part as follows: "Received from Geo. Anastasi, hereinafter designated as the purchaser, the sum of One Thousand .... ($1,000.00) Dollars, being deposited on account of G. A. Thirty six thousand .... ($36,000.-) Dollars, lawful money of the United States of America; the purchase price of the following described property * * *." Nothing was said concerning the deposit. The seller signed the contract. At about that time the buyer, Anastasi, arrived and respondent said to him, "Well, you bought yourself a building, Mr. Zimmerman just signed the contract." The seller testified at the hearing that he would not have signed the contract had he known the deposit was a promissory note.

Respondent and his salesman, Harrison, testified that when they had talked to the buyer earlier he had asked if he should withdraw money from the bank and they said no, thinking he had a checking account and could write a check for the deposit. When the time came to close the deal the buyer disclosed that he had no checking account but stated that he had plenty of funds in the bank. It was then after 3:00 p. m. Under these circumstances respondent suggested that the buyer sign a demand promissory note for the deposit and this was done. The note read as follows: "On demand, for value received undersigned Geo. Anastasi promise to pay to St. Germain & Co., the sum of $1,000.00. This note being in lieu of check or cash deposit on account of agreement of sale of this date, entered into by the parties. Said deposit subject to terms of agreement."

The buyer said that the Bank of America, Columbus branch, would back him up, and that he would meet respondent there the following Monday morning. Respondent was there but the buyer never showed up. Thereafter, respondent attempted unsuccessfully to have the buyer carry out the contract.

The seller did not learn the nature of the deposit until June 18, when, upon inquiring at respondent's office to see what was holding up the transaction, he learned that respondent was having difficulty in reaching the buyer, and was informed that the down payment was a promissory note which had been temporarily misplaced by respondent, and that the amount of the deposit had not been increased to 10%, as was required by the contract. In spite of these things the seller said he was still willing to go through with the deal if the buyer was also willing.

When respondent finally got in touch with the buyer, the latter refused to go through with the contract. The seller testified that after he signed the contract he received calls from other persons about the property but turned them down on the assumption the place was sold. Thereafter respondent paid the seller the sum of $375 although the promissory note had not yet been collected. Although the seller attempted to withdraw the complaint he had filed against respondent with the commissioner, the latter went ahead with the hearing on that complaint.

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[1] The act involved here is cited as the "Real Estate Law" Section 10000 Business Professions Code.

The Real Estate Law Involved.

Section 10176 of the Business and Professions Code (the Real Estate Law) provides that the commissioner on his own motion may, and if any person files a verified complaint, shall, investigate, the actions of any person "engaged in the business or acting in the capacity of a real estate licensee" and may temporarily or permanently revoke a real estate license where the licensee has been guilty of "(a) Making any substantial misrepresentation * * * (i) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing." The commissioner found that respondent's action in failing to disclose to his principal that the $1000 mentioned in the deposit receipt as having been received from the buyer was not cash but a nonnegotiable promissory note to respondent, violated both subdivisions (a) and (i) above set forth.

Findings of the Court.

The court, exercising its independent judgment on the evidence as shown in the transcript, made the following finding: "It is true that frequently the real estate profession accepts a note or a check from a prospective buyer without divulging the same to the seller and that the petitioner while acting as the agent for the sellers took the responsibility and stood good for the credit and that he issued and adjusted the payment of a portion of the forfeited deposit to the said Zimmermans."

[1, 2] Assuming, without deciding, that if there were a custom of the real estate profession to accept nonnegotiable promissory notes as payment in real estate transactions without disclosure to the principal, such a custom would excuse an action which would otherwise constitute a violation of the Real Estate Law, it becomes necessary to determine if there is any evidence in the record to support the court's finding that such a custom exists. We have carefully read the record. There is no evidence to support it. There is evidence to support that part of the finding which states that *checks* are customarily accepted by brokers in real estate transactions, in place of cash, but the only evidence on the subject of *promissory notes* is the testimony of respondent:

"Q. Well, then, you have had occasion to be in this business for many years? A. Yes.

"Q. And are familiar with all the customs and uses of the business or profession, especially in your particular office? A. Yes sir.

"Q. And you are familiar with how the business is carried on in the City and County of San Francisco, having been in that business all these years; is the right? A. Yes."

No question was then asked him as to whether there was a custom concerning the acceptance of promissory notes. Later he gave the following testimony:

"Q. Let me ask you this. In your forty years in the business is that a custom in transactions? At this time if a client hasn't got the money or a checking account, to take a demand note? A. It has been a number of times in my experience; always successfully.

"Q. This is the first time it has fallen down in your experience? A. Yes. * * *."

This, of course, was not testimony that there was any such custom in the real estate business generally. At most it was merely testimony that respondent had done it by a number of times successfully. Of course, custom is not proved by the acts of the individual in question, but by proof of the practices of persons in that profession generally. 25 Cal.Jur. 418; People v. Caldwell, 55 Cal.App.2d 238, 130 P.2d 495. Moreover, even assuming that this was evidence of a custom to accept notes, it does not even purport to show that such custom, if it exists, includes the failure to divulge such acceptance to the principal. No such custom was proved and hence the court's finding on that subject must fall.

Respondent's Act Violated the Real Estate Law.

[3, 4] The court made the following finding: "It is true that the petitioner did not intend to nor did mislead the sellers and it is true that the petitioner did not act in a fraudulent nor dishonest manner in his dealings with the said sellers." We agree with such finding in so far as intentional fraud or dishonesty is concerned. The commissioner recognized such fact by making the suspension a nominal one. However, in spite of the fact that respondent acted in good faith in the matter, he still violated the spirit and letter of the Real Estate Law. It is a well known fact that prior to the enactment of this Law, there were a considerable number of persons engaged in the real estate business who were carrying on that business in an unethical manner, and that one of the purposes of the Law was to raise the standards of that profession and to require its members to act fairly and ethically with their clients. Some of the things which brokers had done theretofore, and which were not necessarily illegal or unethical, were prohibited in the interests of protecting the public. Thus, commingling the money or other property of his principal with his own is expressly prohibited. There were many brokers, prior to the enactment of the Law, who placed moneys received for their clients in their personal accounts, and yet who scrupulously paid their clients every cent coming to them. It was not that commingling moneys meant necessarily that the client would be defrauded, but that such a practice might result in fraud or injury to the client. So it is with the undisclosed acceptance of a promissory note. In this case, the broker was well able to make good the full amount of the note had the seller insisted. But the possibilities of fraud, and of injury to a seller by the undisclosed acceptance of a promissory note are unlimited. In the first place, the seller is entitled to know before entering into a binding obligation to tie up his property by an agreement to sell, that for some reason the buyer either cannot or will not put up cash. He, rather than his broker, should determine whether the reason for the buyer's not paying cash is satisfactory. He, rather than his broker, should determine whether he is satisfied that a promissory note be accepted as a payment, even though the broker stands ready, as here, to guarantee its payment. For us to hold that a broker may accept a promissory note as payment to his principal, without disclosure, is not a violation of the law, would be to countenance a practice which is equally as dangerous as the commingling of money.

In this case, the violation of subdivision (a), "misrepresentation," and subdivision (i), conduct which "constitutes fraud or dishonest dealing" was not intentionally done. The misrepresentation and dishonesty were passive rather than active. When the broker showed the seller the deposit receipt reading "Received from * * * the purchaser, the sum of One Thousand ...... ($1,000.00) Dollars, being deposited on account of * * * the purchase price," etc., signed by respondent as agent for the seller, such act was a representation that the agent had received that much money for his principal. The seller had the right to believe that the person he was asked by his own broker to enter into an agreement with, was able to and did put up one thousand *dollars* (i. e., money), and that if the buyer for any reason not chargeable to the seller refused to go on with his agreement, there was that much of the buyer's money to be forfeited and kept by the seller. But when a promissory note is accepted, the money is not there to be kept. The seller has a lawsuit on his hands to collect on the note. He, at least, is entitled to know from his own agent that that might be the situation before he signs the agreement of sale.

[5] Respondent's testimony shows that the custom in real estate transactions is for the agent to accept checks in payment of the purchase price of real property. Whether it is the custom not to divulge to the seller principal that the down payment is so made does not appear. Assuming that

the custom goes that far, it is a long way from establishing a custom to accept promissory notes, as there is a great difference between a check and a note. One of the most important differences is that when a person gives a check he represents that he has the money in the bank to cover it, and that the bank will pay the amount called for. 19 Cal.Jur. 948. Moreover, if he does not have the money in the bank it may constitute a crime. Penal Code, § 476a. A note, even one payable on demand, makes no such representation, and the failure to pay when presented is not a crime. In modern business checks are universally accepted as money; promissory notes are not.

[6, 7] "'The law of California imposed on * * * the real estate agent, the same obligation of undivided service and loyalty that it imposes on a trustee in favor of his beneficiary. Violation of his trust is subject to the same punitory consequences that are provided for a disloyal or recreant trustee. King v. Wise, 43 Cal. 628.' Langford v. Thomas, 200 Cal. 192, 196, 252 P. 602, 603. Such an agent is charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision. [Citing many cases.]" (Rattray v. Scudder, 28 Cal.2d 214, 222, 169 P.2d 371, 376, 164 A.L.R. 1356.

Respondent has cited no case supporting his contention that the undivulged acceptance of a promissory note as here is not a violation of the Law. He has cited cases involving situations where as between a debtor and the agent's principal, it has been held that the agent's acceptance of a check constitutes payment to the principal. To the safe effect is Indemnity Ins. Co. v. Watson, 128 Cal.App. 10, 16 P.2d 760, as to the acceptance by the agent of a note upon which he promptly secured cash and which note was eventually paid. There the court said: "In California the general rule which prohibits payment to an agent authorized to collect in any form other than money has been relaxed to permit payment by check. California Stearns Co. v. Treadwell, 82 Cal.App. 553, 256 P. 242. On principle, no good reason appears why the relaxation should not be extended as stated in the above-quoted language from Corpus Juris to include payment by note where, as here appears, money or its equivalent in bank credit was immediately secured by the agent through sale of the note which upon maturity was paid in full by the maker." 128 Cal.App. at page 18, 16 P.2d at page 764. Under certain circumstances it has been held that the setting off of an agent's indebtedness against that of an indebtedness to his principal constitutes payment. Stuyvesant Ins. Co. v. Susses Fire Ins. Co., 3 Cir., 90 F.2d 281. In none of these cases was the agent impliedly representing to his principal, as here, that he had received money. More important, in none of them was it a situation in which, at the very inception of the agreement into which the principal was entering, the true facts were concealed from him by his agent. Jones v. Real Estate Commissioner, 80 Cal.App.2d 592, 182 P.2d 289, is not in point here. There the appellate court compelled the commissioner to reinstate the broker's license, not because the alleged misrepresentations did not amount to unfair dealing, but because it found that there was no evidence showing such misrepresentations were made.

[8, 9] Respondent contends that as he received no advantage from his failure to disclose he did not violate the Law. The Law, however, does not make the securing of an advantage an element. Respondent also contends that before any one could be found guilty of violating the Law by accepting a promissory note as a down payment without divulgence, the Legislature must first amend the Real Estate Law to prohibit such action or at least the commissioner must promulgate a regulation prohibiting such action. There does not have to be any such action, either by the Legislature or the commissioner, to prohibit what is already prohibited by the Law, namely, misrepresentation and dishonest dealing. Perhaps had the evidence established a long-continued custom of the profession of acceptance of notes without divulgence, a situation might have existed which would require, as a practical matter,

a notice by the commissioner to all engaged in the real estate business to desist from that practice before a crackdown should take place. However, as heretofore pointed out, there is no evidence of such custom in this case. Moreover, all real estate brokers who are conscious of their ethical obligations to their clients should know that this practice is not safe or ethical.

A real estate broker, like a trustee, has an affirmative duty to disclose all material facts which might influence the decision of his principal; the fact that the prospective buyer cannot or does not make the down payment on the purchase of real property in money but by a promissory note is a material fact which the seller is entitled to know before agreeing to sell; here the agent failed to make such disclosure and hence violated the Real Estate Law as above set forth.

The judgment is reversed.

PETERS, P. J., concurs.

WARD, Justice.

I dissent.

The problem herein presented to this court is not the sufficiency of the evidence to sustain the determination of the issues involved and the reasonableness of the penalty imposed by the real estate commissioner. Upon the issuance of a writ of mandate those questions have been adjudicated in the trial *de novo* in the superior court. The task assigned to this court is to consider the findings of the superior court and examine the evidence in the light of the sufficiency thereof to sustain such findings, —in brief, to conclude if the trial court was correct in determining that under the provisions of section 10176 of the Business and Professions Code there was no substantial misrepresentation (subd. (a) and no fraud or dishonest dealing (subd. (i).

Any statement which does not place the buyer or the seller at a disadvantage should not be classified as a "substantial misrepresentation." Here it is not the making of a statement but the failure to make all the details known to the seller that is the basis of the charge of dishonesty. It is not claimed that any statement made or not made was with intent to defraud or take an undue advantage of the seller. The evidence does not disclose that the seller was in fact injured. The seller, with reference to a conversation had with an attachee of the agent's office, testified as follows: "As far as I am concerned, I even told her so —as far as I am concerned I will still stand behind the deal even if his time limit had expired to increase his deposit on the purchasing price."

In support of the claim that the agent was dishonest, the real estate commissioner states that it is not the custom to accept a promissory note in lieu of a check or cash as a deposit on the purchase price. There is the testimony of the agent that in some cases he had adopted the practice and custom of accepting promissory notes. There was no cross-examination to indicate that the testimony to that effect was untrue and no evidence was presented indicating it was not a custom followed under certain circumstances by agents generally. In this connection the trial court stated: "To the contrary, it only appears that the agent followed a practice that has been carried on by brokers, and believed that he was accepting the note for cash and was responsible to the seller therefor. In view of these facts there is no basis whatsoever for the findings and decision made by the Commissioner. They are not supported by the evidence." There is substantial evidence to support the finding of the trial court. This court may not revalue, nor substitute its opinion for, the findings of the trial court when such findings are supported by the evidence.

The trial court may have concluded that although the penalty imposed by the period of suspension indicated only a technical, if any, violation of the act, the findings and "Determination of Issues Presented," as set forth by the commissioner, branded the agent as a dishonest agent, a stigma that never could be lived down. The trial court may have concluded that the power of revocation and suspension of a license to practice a profession or conduct a business should be used only in "justifiable cases". Jones v. Real Estate Commissioner, 80 Cal. App.2d 592, at page 600, 182 P.2d 289.

I am satisfied that the order of the trial court should be affirmed.

Hearing denied; SHENK and CARTER, JJ., dissenting.

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95 Cal.App.2d 725

YOUNG et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 17417.

District Court of Appeal, Second District, Division 2, California.

Jan. 26, 1950.

Cheryl Melinda Young, a minor, by her guardian ad litem, sued the Bank of America National Trust & Savings Association for personal injuries.

From a judgment of nonsuit by the Superior Court of Los Angeles County, Edward R. Brand, J., plaintiff appealed.

The District Court of Appeal, Wilson, J., held that the judgment was erroneous as depriving plaintiff of constitutional right to have the jury determine the witnesses' credibility and draw presumptions and inferences justified by evidence.

Judgment reversed.

1. Jury ⇨34(3)

In personal injury suit, judgment of nonsuit was erroneous as depriving plaintiff of constitutional right to have jury determine witnesses' credibility and draw presumptions and inferences justified by evidence.

2. Negligence ⇨32(4)

A minor accompanying her mother to bank where mother was transacting business was an invitee or business visitor, to whom bank owed duty to maintain its premises in reasonably safe condition.

3. Appeal and error ⇨927(3)

On appeal from judgment of nonsuit, every inference and presumption favorable to plaintiff, fairly arising from evidence, must be considered as facts proved in plaintiff's favor.

4. Negligence ⇨136(15, 25)

Whether bank was negligent in failing to cause repair of defective door check, so as to prevent bank building door from swinging inward, and whether injury to bank patron's infant daughter, struck by inward swinging door, was caused by bank's failure to exercise degree of care due to its invitees and business visitors, were questions for jury under evidence.

5. Evidence ⇨591

In action for injuries to infant, struck by inward swinging door of defendant's branch bank building, testimony of branch bank manager, called by plaintiff under statute, was not binding on her, and should have been disregarded so far as unfavorable to plaintiff. Code Civ.Proc. § 2055.

6. Negligence ⇨125

In action for injuries to bank patron's infant daughter, struck by inward swinging door of defendant's branch bank building, branch bank manager's testimony as to injury to his infant grandson as result of catching his hand in same door three or four weeks before plaintiff's injury, was admissible as tending to show cause of plaintiff's injury, notice to defendant of defective condition of door and door check, and defendant's negligence in failing to have door check placed in good working order.

7. Negligence ⇨32(1), 48, 52

The owner of business place must exercise ordinary care to keep premises in reasonably safe condition for business visitors or warn them of danger, and such duty is not limited to conditions actually known by owner to be dangerous, but extends to conditions which may be found dangerous by exercise of reasonable care.

8. Negligence ⇨48

Notice to branch bank manager of defective condition of bank door and its appliances because of his knowledge of injury to his grandson as result of catching his hand in door several weeks before injury to another child, struck by door when it swung inward, and such manager's failure to exercise reasonable care to ascertain such condition and order repair of defective mechanism, were imputed to bank as his employer.

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Meserve, Mumper & Hughes, Los Angeles, for appellant.

Sidney A. Moss, Henry F. Walker, Los Angeles, for respondent.

WILSON, Justice.

[1] The judgment of nonsuit from which plaintiff has appealed must be reversed since thereby the trial court has deprived plaintiff of her undeniable constitutional right to have the jury which was empaneled to hear the case determine the credibility of the witnesses and draw such presumptions and inferences as were justified by the evidence. In granting the nonsuit the court has appropriated the functions of the jury and, as shown by the court's remarks, has drawn inferences and indulged presumptions which may have been alien to the minds of the jurors.

The rules governing the trial court in the granting of a motion for a nonsuit or a directed verdict are set forth in Weck v. Los Angeles County Flood Control District, 80 Cal.App.2d 182, 190, 181 P.2d 935, and the power and function of an appellate court in reviewing a judgment of nonsuit are found in Bosqui v. City of San Bernardino, 2 Cal.2d 747, 760, 43 P.2d 547, and Shinn v. Johnson, 83 Cal.App.2d 661, 662, 189 P.2d 322.

At the time of the accident in question plaintiff was 18 months of age. On December 27, 1945, she was taken to the branch bank of defendant in Glendale by her mother, Mrs. Young, who intended to open a savings account. They entered through the Broadway entrance to the bank. At the main entrance on Brand Boulevard there were two large bronze doors so hinged that each could be pushed either outward or inward. They were equipped with devices known as double-acting door checks which, if in proper working order, would cause the doors to stop when they first reached the center or closed position and prevent them from swinging outward and inward after they had been released by a person who had passed through the doorway. While Mrs. Young was waiting to reach the counter where her account was to be opened plaintiff ran toward the Brand Boulevard entrance at about the time a patron was leaving the bank. The latter pushed the door outward and when it was released it did not stop at the closed position but swung inward and outward several times. The child reached the door while it was swinging, was knocked down by its force and her thumb was severed at the first joint.

Donald MacVicar, vice president and manager of the branch bank, called by plaintiff under section 2055 of the Code of Civil Procedure, testified he had been manager of that branch for several years; in December, 1945, three or four weeks before plaintiff was injured, his grandson, about three and a half years of age, had sustained a fractured finger when his hand was caught in the same door; his daughter-in-law, mother of the boy, informed him of the accident immediately after its occurrence; he was in and out of the bank through the Brand Boulevard doorway daily during November and December of 1945 and thereafter; from the time of his grandson's injury until January, 1947, he did not observe any change in the operation of the door and paid no attention to the manner in which it operated; he did not remember whether he noticed any change in the functioning of the door, and did not know whether or not it was serviced during that period; although he passed through the doorway once or twice daily for several years he did not remember whether the door swung or "flip-flapped" back and forth, and could not say positively that it did not do so.

Two witnesses who had had several years' experience in the maintenance and servicing of double-acting door checks of the type on the door in question gave expert testimony concerning the construction, design, purpose and function of such devices. They testified that if the door check had been in proper working order it would have acted as a brake similar to a hydraulic brake on an automobile and would have stopped the door at the center or closed position and would have prevented it from swinging inward and outward. One of the witnesses had observed the functioning of the door in question in October, 1946, and in January, 1947. He found there was no checking action—the door would swing past the center point and continue to "flip flap back and forth" until finally it came to rest, such action being due to a defect in the checking device. The door weighed several hundred pounds.

[2] Plaintiff minor, when accompanying her mother to the bank where the latter was transacting business, was an invitee or business visitor, and defendant owed her a duty to maintain its premises in a reasonably safe condition. Crane v. Smith, 23 Cal.2d 288, 297, 144 P.2d 356. Defendant concedes this to be the rule. It also concedes that the defense of contributory negligence is not available against a child of tender years.

The evidence is uncontradicted (1) that the door check was out of order; (2) if in order it would have prevented the door from swinging or flapping; (3) its failure to function permitted the door to swing inward and outward instead of stopping on its first arrival at the closed position; (4) plaintiff was a business visitor in the bank; (5) she was injured by the swinging door; (6) the manager passed through this doorway daily for several years prior to the accident; (7) the injury to his grandson by the same door was made known to him immediately after the accident; (8) the door check was not repaired.

[3, 4] Every inference favorable to plaintiff fairly deducible from the evidence and every favorable presumption fairly arising therefrom must be considered as facts proved in favor of plaintiff. Bosqui v. City of San Bernardino, 2 Cal.2d 747, 760, 43 P.2d 547. The jury had a right to draw its own inferences and to make its own deductions from the evidence, and to find therefrom that defendant either was or was not negligent and that plaintiff's injury was or was not caused by defendant's failure to exercise the degree of care due from it to its invitees and business visitors. The nonsuit has wrongfully deprived plaintiff of her right to have these matters determined by the jury.

The jury, if permitted to perform its functions, might have determined (it would have been justified by the evidence in so doing) that plaintiff's injury was caused by the dangerous and defective condition of the door and its checking device; that defendant, through its manager, had notice of such condition for a period of sufficient duration prior to the accident to have had the defect remedied by causing the door check to be repaired and placed in good order so that it would have prevented the door from swinging. It is in evidence, uncontradicted, that the door remained in the same defective condition in October, 1946, and January, 1947, more than a year after the date of plaintiff's injury.

[5] The evidence of MacVicar, manager of the bank, produced by plaintiff under section 2055 of the Code of Civil Procedure, was not binding upon her on the motion for a nonsuit,—it weighed for her as far as favorable, but should have been disregarded where it was unfavorable. Weck v. Los Angeles County Flood Control District, 80 Cal.App.2d 182, 191, 181 P.2d 935.

[6] Evidence of the accident to the boy occurring previously to plaintiff's injury, under what may be inferred to be substantially the same circumstances as the one now under discussion, was admissible for the consideration of the jury as tending to show (1) the cause of plaintiff's injury, (2) notice to defendant of the defective condition of the door and door check, (3) negligence on defendant's part in not having the door check placed in good working order. Wills v. Price, 26 Cal.App.2d 338, 344, 79 P.2d 406, and cases cited.

While defendant's argument would be apropos if the appeal were from a judgment rendered after the case had been fully tried, much of it is not applicable in discussing a nonsuit where all inferences and presumptions fairly arising from the evidence must be taken in favor of plaintiff.

To sustain the judgment defendant relies on Olson v. Whitthorne & Swan, 203 Cal. 206, 263 P. 518, 58 A.L.R. 129, where a nonsuit was affirmed in a swinging-door case. While that case involved the injury to the plaintiff by a swinging door the other features of the action are entirely different from those of the instant case. "There was no proof of negligence on the part of the defendant in the installation, maintenance, operation, or supervision of the doors, nor of any defect in anything connected therewith at the time of the accident." 203 Cal. at page 208, 263 P. at page 519, 58 A.L.R. 29. The plaintiff was an adult; she was standing with her back toward the door and from 12 to 16 inches from it; she was not looking at the door before she was struck. The only witness besides the plaintiff was a building inspector called on her behalf who testified that when the door was opened it would rebound from four to six inches from the center line or closed position. Since the plaintiff stood from 12 to 16 inches from the door the evidence did not sustain her claim that the door struck her on its rebound, which was not more than six inches. In the Olson case there was not, as there is in the instant case, any evidence (1) concerning the tension, function or operation of the door check; (2) as to whether the door struck the plaintiff by reason of its rebound or was pushed against her by some one who followed her through the doorway; (3) as to whether or not the door check was in good working order or in disrepair; (4) that any prior accident had occurred at the same place; (5) of facts from which notice of a dangerous condition could be imputed to the proprietor.

In Dolan v. Growers Outlet, Inc., 129 Conn. 158, 26 A.2d 788, the court sustained a judgment for the plaintiff, holding that under the evidence the jury could reasonably have found that (1) the swinging door which injured her, having been released by another person, swung back with sufficient force to injure plaintiff, and (2) the door was not reasonably safe for the use of plaintiff and other invitees because it was without sufficient restraining mechanism to cause it to stop or to reasonably retard the momentum of the backswing when released. In Todd v. S. S. Kresge Co., 384 Ill. 524, 52 N.E.2d 206, where a verdict was rendered in favor of plaintiff and a judgment for defendant notwithstanding the verdict was reversed, it was held that by reason of evidence that door checks on the swinging door leading to defendant's store were defective and the prospective customer while exercising due care for her own safety was struck by the door, a case for the jury was presented. Nersiff v. Worcester County Institution for Savings, 264 Mass. 228, 162 N.E. 349, and Norton v. Chandler & Co., Inc., 221 Mass. 99, 108 N.E. 897, both involving injuries caused by revolving doors, are alike in fact and in result. In each case the evidence showed (1) that adjustable friction strips of rubber and felt had been installed on the four wings of the door to prevent it from spinning; (2) if used long enough and not readjusted, the friction strips would deteriorate and fail to connect with the door frame so as to check the speed of the door in revolving. In each case the court held the question whether the door had become unsafe because of the defendant's negligence in failing to make repairs and readjustments to the friction strips was a question for the jury to determine. In the Nersiff case the defendant's motion for a directed verdict was denied and judgment for the plaintiff was affirmed. In the Norton case a directed verdict for the defendant was reversed and judgment entered for the plaintiff.

[7] The owner of a place of business in obligated to exercise ordinary care to keep his premises in a reasonably safe condition for business visitors or to warn them of danger, and such duty is not limited to conditions actually known by the owner to be dangerous but extends to conditions which might have been found dangerous by the exercise of reasonable care. Blumberg v. M. & T. Incorporated, 34 Cal.2d 226, 209 P.2d 1.

[8] MacVicar's knowledge of the accident to his grandson was sufficient to have caused him in the exercise of ordinary care (1) to ascertain the condition of the

door and its appliances and (2) to have ordered the repair of the defective mechanism. Notice to MacVicar, manager of the bank, and his failure to exercise reasonable care are imputed to his employer, defendant bank.

Judgment reversed.

MOORE, P. J., concurs.

McCOMB, J., deeming himself disqualified does not participate herein.

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95 Cal.App.2d 857

GOSSELIN v. HAWKINS et al.

No. 14116.

District Court of Appeal, First District,
Division 1, California.
Feb. 3, 1950.

Action by Anthony J. Gosselin against Melvin Chester Hawkins and United States Rubber Company for personal injuries sustained in motor vehicle accident.

The Superior Court of Marin County, J. O. Moncur, J., entered a judgment for defendants on verdict of jury, and plaintiff appealed.

The District Court of Appeal, Bray, J., held that there was substantial evidence to support a finding that the plaintiff was a guest.

Judgment affirmed.

1. Appeal and error ⇨930(1)

Where there was a general finding for defendant any conflict in the evidence so far as material must be assumed to have been resolved in favor of appellee.

2. Appeal and error ⇨989

Where jury found for defendant in action for injuries sustained in motor vehicle collision, District Court of Appeal was required to examine record to see whether there was any substantial evidence to support jury's finding that plaintiff was a guest even though plaintiff did not at any time request a ruling by trial court that as a matter of law the plaintiff was a passenger.

3. Automobiles ⇨181(2)

The compensation essential to constitute one a passenger need not be received by driver for transportation involved in sense that person transported obtained or purchased transportation for some independent purpose of his own, and where trip was not primarily for a social purpose it is sufficient to show that person doing transporting was to receive a substantial benefit from such transportation, and fact that person carried received no benefit is immaterial. Vehicle Code, § 403.

4. Automobiles ⇨242(1)

The burden of proving that person transported by motorist was not a guest was upon plaintiff suing for injuries sustained in motor vehicle accident. Vehicle Code, § 403.

5. Appeal and error ⇨930(1)

On determining whether there is substantial evidence to support finding by the jury the District Court of Appeal must take evidence and inferences which may reasonably be drawn therefrom.

6. Automobiles ⇨244(20)

In action for injuries sustained in motor vehicle accident, evidence sustained finding that plaintiff was a guest. Vehicle Code, § 403.

7. Automobiles ⇨181(2)

Where the issue was whether plaintiff injured in motor vehicle accident was a guest or a passenger and evidence was conflicting and somewhat confused concerning what had occurred prior to and at time of dinner partaken by two of the persons involved, fact that plaintiff paid for some of drinks at close of business hours was a circumstance to be considered. Vehicle Code, § 403.

8. Automobiles ⇨245(24)

Whether a person riding in another's automobile is there for mutual business purposes, for business purposes of driver or whether social events were merely incidental to such purposes or whether the ride was merely a social one are questions of fact for the jury. Vehicle Code, § 403.

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Harry W. Falk, Eureka, Attorney for appellant.

Bronson, Bronson & McKinnon, San Francisco, Attorneys for respondents.

BRAY, Justice.

From a judgment in favor of defendants entered upon a jury verdict, and after denial of motion for new trial, plaintiff appealed.

Question Presented.

Plaintiff's main contention is that as a matter of law the evidence shows (1) plaintiff was a passenger and not a guest in defendants' car; (2) that defendants were negligent; and (3) that plaintiff was not contributorily negligent nor did he assume the risk of injury.

Facts.

Plaintiff in 1946 was in business in Eureka, selling and servicing automobile and truck tires at retail. He had held a franchise with defendant United States Rubber Company for the last nine years. Defendant Hawkins was a sales representative for United States Rubber Company, his territory extending from the Golden Gate Bridge north to the Oregon line. Hawkins called on plaintiff about once a month to take orders for new tires and retreading business. Plaintiff prepared to expand his business by taking on the agency for International Harvester and dealing in farm and industrial equipment. He had signed the franchise agreement in May, and left Eureka on September 4 to go to San Francisco and confer with International Harvester officials. He took the train to San Rafael, and then the bus to San Francisco. He arrived in San Francisco the morning of September 5 and his discussions with the officials continued through the 6th.

The evidence as to what happened on September 6 is rather sketchy, and conflicting on some points. Plaintiff testified that while in San Francisco he phoned United States Rubber Company to see about obtaining certain tires of which the supply was short; that Hawkins got on the wire, asked plaintiff to see him and hear about some new tires which were coming out, and after plaintiff said he lacked time, Hawkins suggested they have dinner together, after which he would drive plaintiff to San Rafael to catch the train there. Plaintiff testified that Hawkins picked him up around 4:30 p. m. at the International Harvester office, that they visited the Lambert Tire and Sales Company to see a new wheel aligning machine, and finally went to a restaurant on Lombard street. According to plaintiff, Hawkins talked during the meal about the new tires to be brought out by United States Rubber Company, their prices, construction, and methods of interesting the public in them.

The next thing plaintiff remembers is being in Hawkins' car, proceeding toward San Rafael. He recalled that at a particular point approaching San Rafael he suggested that Hawkins drive slower. In general, however, he remembered Hawkins as driving in a normal manner. Plaintiff's next recollection was of waking up in a hospital later that evening, after the accident.

The train was scheduled to depart from San Rafael at 8:00 p. m. The two men were seen at the train station between 8:00 and 8:30, at a time when the train had already left. After entering and being in the station for just a few minutes, they turned around and walked out again. Shortly thereafter they were found unconscious in the accident here involved, the car being found off the road against a tree in a residential district about one mile north of the San Rafael station.

[1] Defendant Hawkins remembered nothing specific about the events of September 6 although he had a general recollection of having seen plaintiff in defendants' office. The United States Rubber Company sales manager for northern California testified that the two men were in his office on the 6th, discussing with him plaintiff's new activities and plaintiff's efforts to have more tires allocated to him. Plaintiff denied that such a meeting took

place on the 6th, but to the extent that the conflict is material this court must assume the jury found as true the testimony of defendants' witnesses.

At the point where the accident occurred, the surface of the road was cracked and rough, not having been repaved since 1914. At that point the road turns left, but slopes to the right, the opposite of a banked highway curve. A telephone pole struck by the car was 12 inches from the curb. Witnesses estimated the speed of the car just before the accident as "a high rate of speed" and "'tween sixty and seventy miles an hour." The extensive evidence concerning plaintiff's injuries and medical expenses is not material on this appeal and will not be set forth.

Legal Issues.

The parties agree that one who is simply a guest cannot recover unless he shows the driver to have been guilty of wilful misconduct, whereas one who is a passenger (invited to ride because of an advantage to the driver) can recover if the driver was simply negligent. Furthermore, plaintiff concedes that the jury could reasonably have found that Hawkins was *not* guilty of wilful misconduct.

Guest or Passenger?

[2] In its instructions, the court properly defined "passenger" and "guest" and the degree of care due to each. The jury impliedly found that plaintiff was a guest and not a passenger. Plaintiff contends that the evidence shows, as a matter of law, that he was a passenger and likewise as a matter of law he did not assume the risk nor was he contributorily negligent. Defendants contend that plaintiff cannot raise the question as to whether he was a passenger on appeal for the reason that at the trial the issue was treated as one of fact for the jury, and at no time did plaintiff request a ruling on it from the trial court. Assuming, without deciding, that his contention is correct, we still have to examine the record to see if there is any substantial evidence to support the jury's finding. Herbert v. Lankershim, 9 Cal.2d 409, 71 P.2d 220; Huetter v. Andrews, 91 Cal.App.2d 142, 204 P.2d 655. So it becomes relatively unimportant whether we are considering the evidence to determine if plaintiff as a matter of law was a passenger, of whether, as is our duty on any appeal, to determine if there is any evidence to support the verdict.

[3-8] To determine this question we must decide if there is substantial evidence that plaintiff was a guest in the car. Section 403 of the Vehicle Code, in effect, defines a guest as a person who "accepts a ride * * * without giving compensation for such ride." A passenger is one who gives compensation for the ride. As said in Kruzie v. Sanders, 23 Cal.2d 237, 143 P.2d 704, it is not necessary to constitute compensation that it be established "that the compensation received by the driver was given 'for such ride' in the sense that plaintiff obtained or purchased transportation for some independent purpose of her own. Where the trip was not primarily for a social purpose it is sufficient to show that defendant was to derive a substantial benefit from the transportation of plaintiff, and the fact that plaintiff received no benefit therefrom is immaterial." 23 Cal.2d at page 242, 143 P.2d at page 706. The burden of proving that plaintiff was not a guest was upon plaintiff. Whittemore v. Lockheed Aircraft Corp., 65 Cal.App.2d 737, 151 P.2d 670. There is evidence to support a finding that plaintiff was a passenger because defendants received a tangible benefit in that they were accommodating him so that more business would be assured them in the future. However, that is not the only conclusion that can be drawn from the evidence. Taking the evidence and the inferences which reasonably can be drawn therefrom, as is our duty, Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183, there is sufficient to support the jury's finding that plaintiff was a guest. While plaintiff's testimony showed that the dinner and the taking of plaintiff to meet his train was to further the mutual interests of both plaintiff and defendants, the jury did not necessarily have to believe his testimony. Particularly is this so in view of the fact that al-

though he related the conversation at the dinner in considerable detail, he was confused as to what happened between the time they left the Lambert Tire and Sales Company place and the time they arrived at the restaurant, and he could not remember much of what happened after leaving the restaurant. While Hawkins, due to his injuries, was unable to remember any of the circumstances connected with the dinner or the drive, there was a direct conflict between plaintiff's claim that he was not at defendants' office any time that day and the testimony of the witness Barry who positively testified that plaintiff did come to the office that day. Hawkins testified to the same effect. The jury could reasonably infer that the business matters were concluded at the office, and that the meeting of the two men at the close of business hours was for social purposes. The fact that plaintiff paid for some of the drinks is a circumstance to be considered in this respect. There was evidence that plaintiff and Hawkins had been acquainted for some time; that plaintiff had been a guest at Hawkins' home. After the accident plaintiff wrote Hawkins a letter in which he stated: "It made me feel rather bad to think that you might be crippled for life *when you were just accommodating me* * * *" (Emphasis added.) As there was evidence to support a finding that plaintiff was a guest, the case comes within the well established rule in California that whether a person riding in another's car is there for mutual business purposes, for business purposes of the driver, or whether the social events were merely incidental to such purposes, and therefore he is a passenger, or whether the ride was merely a social one, and therefore the person would be a guest, are questions for the jury to determine. Darling v. Dreamland B. & U. Co., 44 Cal.App.2d 253, 112 P.2d 338.

The fact that the finding that plaintiff was a guest rather than a passenger is supported by the evidence, makes unnecessary a consideration of the issues as to whether, as matters of law, defendants were negligent, or plaintiff was not contributorily negligent or did not assume the risk.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

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95 Cal.App.2d 850

PEOPLE v. SEWELL.

Cr. 729.

District Court of Appeal, Fourth District, California.

Feb. 2, 1950.

Hearing Denied March 2, 1950.

Robert Sewell was convicted in the Superior Court of San Diego County, William A. Glenn, J., and from judgment entered against him and an order denying a new trial he appealed.

The District Court of Appeal, Mussell, J., held that the evidence sustained the conviction.

Judgment and order affirmed.

1. Constitutional law 🔑265
Indictment and Information 🔑3, 56

Proceeding against defendant by information for murder in the first degree by information rather than by indictment as permitted by the California Penal Code was not contrary to the Federal Constitution. Pen.Code, § 888; U.S.C.A.Const. Amends. 4–6, 14.

2. Criminal law 🔑517(1)

A confession of a defendant to be admissible must be proved to have been given freely and voluntarily and made without any previous inducement, promise or offer of leniency in punishment or by reason of any duress, intimidation or threat.

3. Criminal law 🔑532

Whether a confession is free and voluntary is a preliminary question addressed to the trial court and to be determined by it.

4. Criminal law ⚷736(2)

Conflicting testimony as to whether confession was free and voluntary presented question of fact for the determination of the trial judge.

5. Criminal law ⚷1158(4)

Where question whether confession was free and voluntary was fully developed in the trial court and the ruling of the trial court admitting the confession was supported by substantial evidence it would not be disturbed on appeal.

6. Criminal law ⚷519(1)

The fact that defendant was not given the benefit of counsel at the time confession was made does not render it involuntary or inadmissible.

7. Criminal law ⚷1170(1)

In hearing by trial judge to determine whether confession was freely and voluntarily made there was no prejudicial error in exclusion of testimony that the same officers a week later had mistreated another prisoner in order to force a confession.

◆

Robert Sewell, in pro. per.

Fred N. Howser, Attorney General, Gilbert Harelson, Deputy Attorney General, for respondent.

MUSSELL, Justice.

Defendant was charged with the offense of murdering one Jack Latham. A jury trial resulted in a verdict of guilty of murder in the first degree with recommendation of life imprisonment.

Prior to the 21st day of December, 1945, Latham owned and operated a tire shop at 2190 Main Street in San Diego. On the evening of December 20th, Mr. Flinn, a truck driver employed by Latham, left the premises at about 5:30 and at that time Latham was in the shop and his car was parked outside. When Flinn returned to the shop the following morning, the car was in the same place as he had observed it upon leaving the night before. Flinn walked through the gate toward the shop and found Latham on his back near the door to the office, dead. Flinn observed that the place was unlocked and found an empty wallet by the body.

The police were called, the body was removed and the report and testimony of the autopsy surgeon established the fact that the deceased had extensive bruises on the head and a depressed or crushed skull fracture which caused his death. The doctor was shown a length of steel pipe found by the officers at the scene upon which there was blood, hair and pieces of tissue from skin and he testified that the wounds and injuries which he saw could have been caused by the pipe. The doctor also testified that he estimated that there were three blows struck on the head of the deceased and that all three blows could have been struck by the same type of an instrument.

The officers contacted the wife of the decedent, and she stated to them that Latham had called her within two or three minutes of 9:00 o'clock on the evening of December 20th; that he called to tell her that he was starting home from work and asked if there was anything she wished him to bring. She stated that she never saw her husband alive thereafter.

The defendant, who had been previously employed by Latham to recap and change tires, was picked up by the police on the 21st day of December and after being questioned at the police department and booked as a murder suspect, was released on the same date. Prior to his release, defendant was questioned by the officers about his activities on the evening of December 20th and he stated that he left his hotel room about 7:00 o'clock in the evening and went to lower Fifth Avenue in San Diego, where he visited several cafes, had drinks with several colored men, and returned to the hotel at about 9:00 o'clock; that soon thereafter, he again left the hotel to get some food for his wife and came back about 11:30 p. m. Shortly after this interview, defendant left San Diego and did not return until January 18, 1949. On that date he was again questioned by the officers, who observed that he was intoxicated, and placed him under arrest on a charge of drunkenness and suspicion of robbery. On the morning of January 20th, defendant was taken to the municipal court, pleaded guilty to the charge of drunkenness and was sentenced to 20 days, with one day suspended.

On the evening of January 20th police officer Ormsby contacted a Mr. Massey, a close personal friend of defendant, and was told by Massey that the defendant had admitted to him that he had gone out to the tire shop on the night of December 20th to burglarize the place and that he had hit the decedent.

The officers again questioned the defendant relative to his movements on the night of December 20, 1945, and defendant stated that he had visited several restaurants and poolhalls that evening and had engaged in a dice game in which he won approximately $87 and that he had returned to his hotel room at about 11:00 p. m. After this statement, and on the morning of January 21, 1949, the defendant was confronted with Massey. In the presence of the officers, Massey related what he had told the officers concerning the admission by the defendant that he had gone to the tire shop on the night of December 20th to burglarize it and had struck Latham. The defendant stated that Massey was not telling the truth and denied any implication in the murder of Jack Latham. On the following day, January 22nd, the officers again questioned the defendant in the presence of Massey and the defendant stated that he wished to make a statement. He was then taken into a room in the homicide division and Miss Bohn, secretary, took and transcribed a lengthy statement in which the defendant voluntarily stated that he had gone to the tire shop at about 8:00 or 8:30 on the night of December 20, 1945, intending to rob the decedent; that he was not intoxicated and that upon entering the gate to the premises, he picked up a piece of pipe; that he then observed that the decedent was checking up the day's receipts; that he waited for five or ten minutes until the decedent walked out of the door of the office into the yard, at which time, to use the defendant's words, "He walked out and I was standing right over there, and I just boom, let him have it." "He was coming out of the door. I was standing like that. He made a step, and I just crowned him." "He came out just like he is standing there, and I hit him on the head, and he fell on an angle like that, on his arm, and he didn't move, and I got kinda nervous." The defendant stated that he searched decedent's pockets, pulled out his wallet, took approximately $100 from the desk and ran out of the place; that he returned to his hotel and told his wife he had struck it rich and when she asked him where he had been, stated that he had pulled a job in Linda Vista; that the following morning, when the police came to question him, he stated that he would like to talk to his wife for a moment and then gave her all of the money except about $3 which he had in his pocket when the officers took him away for questioning; that he had told Robert Massey that he had gone to the tire shop to rob Latham and had struck him; that one or two days later he and his wife left for Los Angeles; that he paid his delinquent room rent of approximately $20 and bought tickets to Los Angeles with part of the money taken from the tire shop.

When shown the piece of pipe picked up by the officers at the scene, the defendant said "I guess that is it." He was asked to identify several photographs taken of the premises and marked them with his initials. The statement was written up by Miss Bohn and in the presence of the officers, the defendant read and initialed each page and made certain corrections in punctuation and spelling, after which he signed it in the presence of officers.

[1] The defendant is proceeding in forma pauperis in this appeal. He contends first that it was contrary to Articles 4, 5, 6 and 14 of the United States Constitution to proceed against him by information instead of by indictment of the grand jury. This contention is answered by the provisions of Section 888 of the California Penal Code, which provides as follows: "All public offenses triable in the superior courts must be prosecuted by

indictment or information, except as provided in the next section, and except as provided by section 859a of this code."

[2, 3] Defendant's next contention is that it was error for the trial court to admit his confession for the reason that his statements were not given voluntarily or freely but only under duress and through fear of physical violence. The rule is elementary that a confession of a defendant to be admissible must be proved to have been given freely and voluntarily and made without any previous inducement, promise or offer of leniency in punishment or by reason of any duress, intimidation or threat. Cal.Jur., Vol. 8, p. 109. Whether a confession is free and voluntary is a preliminary question addressed to the trial court and to be determined by it. People v. Cucco, 85 Cal.App.2d 448, 452, 193 P.2d 86; People v. Dye, 119 Cal.App. 262, 6 P.2d 313; People v. Siemsen, 153 Cal. 387, 395, 95 P. 863.

Prior to the admission of the confession into evidence, defendant took the stand for voir dire examination and told a story of alleged mistreatment by the police officers. He stated that the beating took place on January 22, 1949, and was administered by officer Hughen and another man he did not know; that he suffered from swelling of the eyes and a bad ear as after effects of the alleged beating; that when he arrived at the county jail, after the statement had been taken, his eyes were still swollen.

Defendant produced witnesses, one a lawyer, who testified that he had seen the defendant in the county jail in the latter part of January or the first part of February and that at that time the defendant had some scratches on his cheeks. There was no evidence, however, to connect the scratches with the alleged beating. Another witness stated that he saw the defendant on January 22nd in the city jail and that he had a bandage around his head. However, the jailer stated that he had not noticed any bandage on defendant's head but that he used a white handkerchief to hold down his hair while he slept. Another defense witness testified that in the latter part of January he noticed defendant's ear bleeding, but on cross-examination he could not remember which ear. A doctor testified that he had examined the defendant in the county jail on March 10, 1949, and that he found a perforation of the defendant's left ear drum. On cross-examination, the doctor stated that he could not tell when the perforation occurred and that it could have occurred ten years previous.

The prosecution introduced the testimony of Robert Massey to the effect that when he saw the defendant the second time (which was shortly after the alleged beating) he looked the same as he did all the time and that the police officers did not make any promises of reward or immunity nor did they use any force on the defendant in his presence.

Officer Hughen, who was accused by the defendant as one of the two men who beat him on January 21st, stated that he had never made any threats against the defendant or used force or violence upon him and that he was off work on the 21st and 22nd days of January and did not see the defendant on those days. Records of the police department were introduced which corroborated this testimony.

A picture of the defendant taken on January 25, 1949, at the county jail failed to show any indication of defendant's eyes having been gouged or that there were any marks upon his face.

A witness, Morton L. Geer, stated that he saw the defendant about 9:00 o'clock p. m., January 22nd, and was present while the defendant read a statement and initialed each page; that there were no marks, wounds, bruises or cuts on defendant's face at that time and that his eyes were not swollen but were normal.

Officer Maguire testified that he was present at the time the defendant gave his statement and that was made freely and voluntarily and that at none of the interviews at which he was present was force or violence ever used upon the defendant.

Miss Bohn, the secretary who took the statement from the defendant on January 22nd, testified that there were no bruises, cuts, wounds or injuries upon the face or person of the defendant; that he made no complaint to her about having suffered any such injuries; that in her opinion the statement was freely and voluntarily made and that there were no threats or promises made against or to the defendant in her presence nor was any force or violence used against him.

[4, 5] The testimony of the witnesses for the prosecution and defense presented a conflict as to whether the confession was freely and voluntarily made. This question was one of fact for the determination of the trial judge. His ruling was supported by substantial evidence and will not be disturbed on appeal. People v. Port, 91 Cal. App.2d 152, 204 P.2d 651; People v. Cucco, supra. Particularly is this true where, as in the instant case, the matter has fully developed in the trial court where the defendant had every opportunity to present his position. People v. Mehaffey, 32 Cal.2d 535, 553, 197 P.2d 12. An examination of the statement given by the defendant discloses that he gave a complete account of the homicide and supplied many details which were unknown to the police officers.

[6] The defendant further contends that he was held incommunicado in the city jail from January 18 to January 24, 1949, and that he was denied the right of counsel during that time. It appears from the record that he was booked at the city jail on the afternoon of January 18th on a charge of drunkenness and on suspicion of robbery, and on the morning of the 20th, within the two days maximum time set forth by Penal Code section 825, he was brought into court and pleaded guilty to drunkenness. There is nothing in the record to suggest that he requested representation by counsel. The fact that he was not given the benefit of counsel at the time the confession was made does not render it involuntary or inadmissible. People v. Pongetti, 72 Cal.App.2d 749, 752, 165 P.2d 479.

[7] The defendant next contends that the court erred in refusing to admit the testimony of a witness, Jack Ellis, who, defendant claims, was subjected to the same purported cruel treatment as was administered to him. In the offer of proof defendant's attorney stated that he would show that Ellis was confined in the city jail a week after defendant and he proposed to establish that the same officers administered the same treatment to Ellis as they did to the defendant. The objection to the admission of the testimony of Ellis as being irrelevant and immaterial was sustained by the court and we see no prejudicial error in the ruling.

The contention that the judgment and verdict are contrary to law and evidence is without merit. Defendant had a full and fair trial. He was represented by able counsel at all stages of the court proceedings and the record contains evidence which is amply sufficient to sustain the conviction of murder in the first degree.

Judgment and order are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

34 Cal.2d 724

PRYOR v. UNION PAC. R. CO.

L. A. 21099.

Supreme Court of California, in Bank.
Feb. 10, 1950.

Pearl L. Pryor, Administratrix of the Estate of Wintford A. Pryor, deceased, brought action against the Union Pacific Railroad Company, a corporation, under the Federal Employers' Liability Act to recover for the death of the deceased in Wyoming while employed by the defendant as brakeman.

The Superior Court of Los Angeles County, Ingall W. Bull, J., rendered judgment for the defendant, and the plaintiff appealed.

The Supreme Court, Edmonds, J., held that portion of agreement signed by plaintiff, purporting to limit her right to bring action to a federal and state courts of specified counties located in Wyoming, was void under the act, and that plaintiff was entitled to bring action in California where defendant was doing business.

Judgment reversed.

Prior opinion, 205 P.2d 471.

Contracts ⚿127(4)

Portion of agreement signed by widow of railroad employee, purporting to limit widow's right to bring action for death to federal courts and state courts of specified counties located in Wyoming where employee was injured and died, was void under Federal Employers' Liability Act as being a contract, the purpose of which was to enable railroad to exempt itself from a "liability" created by the act, and was void under California law, and did not preclude widow from bringing action in California as a state in which railroad was doing business. Federal Employers' Liability Act, §§ 1 et seq., 5, 6, 45 U.S.C.A. §§ 51 et seq., 55, 56.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Liability".

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Hildebrand, Bills & McLeod and D. W. Brobst, Oakland, for appellant.

E. E. Bennett, Edward C. Renwick, Malcolm Davis and W. J. Schall, Los Angeles, for respondent.

EDMONDS, Justice.

Pearl L. Pryor, as administratrix of the estate of her deceased husband, sued under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., to recover damages for her husband's death which occurred in Wyoming. The railroad company pleaded, as a bar to the action, an agreement executed by the widow limiting to that state the venue of any action to be brought by her. The appeal is from a judgment in favor of the railroad company upon the issue presented by its special defense.

The husband was killed in Wyoming while employed by the railroad company as a brakeman. Shortly thereafter, Mrs. Pryor executed a contract whereby she received $500 from the employer as an advance "on account of personal injuries and death" of her husband, "such payment not being an admission of liability and to be deducted from any final settlement, which might be made." By the terms of the contract, she agreed that, "in the event settlement can not be concluded, suit for damages * * * will not be brought in any jurisdiction outside of the State and Federal Courts of * * * Wyoming."

Section 5 of the Federal Employers' Liability Act, 35 Stats. 66, 45 U.S.C.A. § 55, provides that any contract, the purpose of which shall be to enable a common carrier to exempt itself from "any liability" created by it shall, to that extent, be void. By section 6, 62 Stats. 989, 45 U.S.C.A. § 56, an action to recover damages may be brought in either a state court or a United States district court either at the residence of the defendant, or where the action arose, or where the defendant is doing business.

The railroad company contends that the venue granted by section 6 is not a "liability". A further argument is that even if venue be regarded as a part of liability, it may nevertheless be bargained away for a consideration after accrual of the cause of action. The appellant takes the position that any contract by which the employer seeks to restrict the venue privileges accorded by the federal statute, falls within the interdiction of section 5.

Some courts have upheld a contract of the kind made by Mrs. Pryor upon the ground that venue and the liability imposed by the statute are separate and distinct, the term "liability" being interpreted as meaning "liability for damages". In other cases, the words "any liability" were construed as encompassing the liability of being subjected to suit in any proper forum as designated by section 6. This is the meaning placed upon the statute by the United States Supreme Court, which has just held that a contract limiting venue is void because the "right to bring the suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of § 5 of the Liability Act * * *." Boyd v. Grand Trunk Western R. Co., 338 U.S. 263, 70 S.Ct. 26, 27.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

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34 Cal.2d 702

PEOPLE v. CENTR–O–MART et al.

Sac. 5963.

Supreme Court of California, in Bank.

Feb. 7, 1950.

Rehearing Denied March 6, 1950.

The People brought civil action against Centr-O-Mart and certain individual defendants to enjoin alleged violations of the Unfair Practices Act.

A judgment dismissing action after entry of order sustaining demurrer to complaint without leave to amend was entered by the Superior Court, San Joaquin County, George F. Buck, J., and the plaintiff appealed.

The Supreme Court, Carter, J., held that State was a proper party plaintiff to maintain the present action.

Judgment reversed.

Prior opinion, 208 P.2d 409.

Edmonds and Schauer, JJ., dissented.

1. Statutes 🔑237

Laws in derogation of sovereignty are construed strictly in favor of state and are not permitted to divest it or its government of any prerogatives, unless intention to effect that object is clearly expressed.

2. Statutes 🔑237

A statute will not be construed to impair or limit sovereign power of state to act in its governmental capacity and perform its governmental functions in behalf of public in general, unless such intent clearly appears.

3. Statutes 🔑233

Where statute is not expressly made applicable to government, it is for courts to determine whether Legislature intended it to apply to government, and in making that determination it is proper to consider all matters which, under rule of statutory interpretation, shed light on legislative intention.

4. Statutes 🔑184

Words of a statute must be given such interpretation as will promote rather than defeat general purpose and policy of the law.

5. Statutes 🔑233

Trade-marks and trade-names and unfair competition 🔑88

The state, though not expressly included in Unfair Practices Act within list of those who may bring actions to enjoin alleged violations of the Act, was a proper party plaintiff to maintain such action. Business and Professions Code, §§ 17000-17101, 17001, 17002, 17020, 17021, 17070, 17100.

Fred N. Howser, Attorney General, and Clarence A. Linn, Deputy Attorney General, for appellant.

Forrest E. Macomber, Stockton, for respondent.

CARTER, Justice.

The district attorney of San Joaquin County began this civil action in the name of "The People of the State of California" against the Centr-O-Mart, a corporation, and certain individual defendants, to enjoin alleged violations of the Unfair Practices Act, Business and Professions Code, Sections 17000–17101. The defendants interposed a demurrer and motion to dismiss the complaint upon the ground that the state was not a proper party plaintiff. The trial court made an order sustaining the demurrer without leave to amend and a judgment of dismissal of the action was thereupon entered.

The only question presented here for determination is whether the state is a a proper party plaintiff to maintain a civil action to restrain alleged violations of the Unfair Practices Act.

The precise question involved has not heretofore been decided by this Court. In People v. Black's Food Store, 16 Cal.2d 59, 105 P.2d 361 and the companion case of People v. Green Frog Food Emporium, and People v. Pay Less Drug Store, 25 Cal.2d 108, 153 P.2d 9, the State successfully maintained actions to enjoin violations of the Act but no objection was there made to the State as a party plaintiff.

Section 17070 of the Act provides that "Any person or trade association may bring an action to enjoin and restrain any violation of this chapter, and in addition thereto, for the recovery of damages." Section 17100 makes any violation of the provisions of the Act a misdemeanor. The word "person" is defined by section 17021 as "any person, firm, association, organization, partnership, business trust, company, corporation or municipal or other public corporation." Section 17020 provides that "The definitions in this article shall be used in construing this chapter."

The question here presented for determination is whether the State, because not expressly included within the list of those who may bring actions to enjoin alleged violations, is excluded by implication. It would appear that this question must be answered in the negative.

[1, 2] The universal rule is that "laws in derogation of sovereignty are construed strictly in favor of the state and are permitted to divest it or its government of any prerogatives, unless intention to effect that object is clearly expressed." 23 Cal. Jur., Sec. 4, p. 526, and cases there cited; C. J. Kubach Co. v. McGuire, 199 Cal. 215, 248 P. 676. A statute will not be construed to impair or limit the sovereign power of the state to act in its governmental capacity and perform its governmental functions in behalf of the public in general, unless such intent clearly appears. People v. California Fish Co., 166 Cal. 576, 592, 138 P. 79.

Section 17001 of the Act provides that "The legislature declares that the purpose of this chapter is to *safeguard the public* against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented." [Emphasis added.] Section 17002 provides that "This chapter shall be liberally construed that its beneficial purposes may be subserved."

[3-5] Where a statute is not expressly made applicable to government, it is for the courts to determine whether the Legislature intended it to apply to government. In making that determination, it is proper to consider all matters which, under the rule of statutory interpretation, shed light on the legislative intention. Nutter v. Santa Monica, 74 Cal.App.2d 292, 168 P.2d 741. Words of a statute must be given such interpretation as will promote rather than defeat the general purpose and policy of the law. Department of Motor Vehicles v. Industrial Acc. Comm., 14 Cal.2d 189, 93 P.2d 131. The Legislature here has specifically declared that the purpose of the Act is to "safeguard the public". It would appear that the State, acting through its law enforcement officers, is a proper party plaintiff to bring suit for that purpose, and that the Legislature did not intend to exclude it by implication.

In the case of Pierce v. Superior Court, 1 Cal.2d 759, 37 P.2d 453, 460, 96 A.L.R. 1020, it was held that the Attorney General, as the chief law officer of the State, has broad powers derived from the common law, and in the absence of any legislative restriction, has the power to file any civil action or proceeding directly involving the rights and interest of the State, or which he deems necessary for the enforcement of the law of the State, the preservation of order, and the protection of public rights and interests. It was there held, 1 Cal.2d at pages 761 and 762, 37 P.2d at page 461, that Political Code, section 1109, was not "to be construed as a restriction upon the broad powers of the Attorney General. The fact that a remedy is given to a private individual to institute such an action could not operate to deny the power of the Attorney General to bring a similar action on behalf of the state, which power exists independent of said section." In State v. Marin Municipal Water Dist., 17 Cal.2d 699, 704, 111 P.2d 651, it was held that the word "person" embraced a municipal water district, and that the general words in a statute would not be construed to limit the otherwise valid power of the State or its subdivisions unless that result was specifically intended by the Legislature.

In accord with the universal rule, and the foregoing authorities, we are of the opinion that there is nothing in the Unfair Practices Act to lead to the conclusion that the Legislature intended to exclude the State, acting through its duly elected officers, from enforcing its provisions in the interest of the public welfare.

The judgment is reversed.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting.)

I find nothing in the Unfair Practices Act which allows the state to maintain a civil action for the purpose of restraining a violation of its provisions. Certainly the broad powers mentioned in Pierce v. Superior Court, 1 Cal.2d 759, 761-762, 37 P.2d 453, 460, 96 A.L.R. 1020, are not a substitute for statutory authority to enjoin the asserted unfair practice of an individual in his dealings with another person.

Section 17070 of the Business and Professions Code reads: "Any person or trade association may bring an action to enjoin and restrain any violation of this chapter and, in addition thereto, for the recovery of damages." By other sections of the same code, the Legislature declared that, for the purpose of construing the statute which is the basis of this action, the word "person" shall mean "any person, firm, association, organization, partnership, business trust, company, corporation or municipal or other public corporation." Secs. 17020, 17021. The basis of the present decision is that the Legislature intended the state to be included within the meaning of the word "person", although the statute does not express such a purpose.

It has been the uniform view of the courts of California that the word "person" does not include the state. In the case of Berton v. All Persons, etc., 176 Cal. 610, 617, 170 P. 151, 154, this court said: "A sovereign state is not a person." The same conclusion was more recently stated in Bayshore Sanitary Dist. v. San Mateo County, 48 Cal.App.2d 337, 119 P.2d 752. In common usage, the term "person" does not include the sovereign, and therefore a statute using that term ordinarily is construed to exclude it. United States v. Cooper Corp., 312 U.S. 600, 604, 61 S.Ct. 742, 85 L.Ed. 1071. The Court of Appeals of New York, in a case in which the definition of the word was of vital importance, held that the word "person" does not, in its ordinary or legal definition, include either a state or a nation. In re Fox, 52 N.Y. 530, 11 Am.Rep. 751; affirmed United States v. Fox, 94 U.S. 315, 24 L.Ed. 192. Upon this reasoning the Supreme Court of the United States decided that the United States cannot maintain a civil action for treble damages under the Sherman Anti-Trust Act, 15 U.S.C.A. § 1 et seq., stating: "* * * the use of the phrase 'any person' is insufficient to authorize an action by the Government. This conclusion is supported by the fact that if the purpose was to include the United States, 'the ordinary dignities of speech would have led' to its mention by name." United States v. Cooper Corp., supra, 312 U.S. at page 606, 61 S.Ct. at page 744, quoting with approval from Davis v. Pringle, 268 U.S. 315, 318, 45 S.Ct. 549, 69 L.Ed. 974.

There is nothing in the Unfair Practices Act which would indicate that the Legislature intended to enlarge upon the ordinary or legal definition of the term "person". The contrary intention is evident. Article 4 of the act deals with the civil liability flowing from its violation. The state is not included among the parties who may bring such an action. By Article 6, a violation of the act is made a misdemeanor as well as a civil wrong (Bus. & Prof. Code, sec. 17100) and there the Legislature has specified the manner in which the state, through the attorney general, shall aid in the enforcement of the law. Had the intention of the Legislature been to give the state a civil remedy, the statute would have expressly provided for it, as was done in the case of false advertising. Bus. & Prof. Code, secs. 17500–17702; see especially sec. 17535 wherein the Legislature has stated in detail the manner in which an action by the state for an injunction may be initiated.

These same factors were relied upon by the United States Supreme Court in interpreting the Sherman Anti-Trust Act. It was stated that when Congress defined the word "person" to "'include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country'", the purpose was "to preclude any narrow interpretation * * *." This definition, said the court, only serves to emphasize "the fact that if the United States was intended to be included Congress would have so provided expressly." United States v. Cooper Corp., supra, 312 U.S. at page 607, 61 S.Ct. at page 745.

The California Unfair Practices Act, like the Sherman Anti-Trust Act, authorizes two classes of actions. In construing the Federal statute, the dual procedure was a factor considered and relied upon by the court in reaching its decision. "The scheme and structure of the legislation", it was said, "is likewise important to a proper ascertainment of its purpose and intent. * * It seems evident that the Act envisaged two classes of actions,—those made available only to the Government, which are first provided in detail, and, in addition, a right of action for treble damages granted to redress private injury. If this be the fair construction of the Act, the Court's task is finished when it gives effect to the purposes of the law, evidenced by the various remedies it affords for different situations. Though the law gave a remedy by way of injunction at the suit of the United States, we were pressed to say that a private person should have the same remedy. We were compelled to answer that Congress had not seen fit so to provide [State of Minnesota v. Northern Securities Co., 194 U.S. 48, 71, 24 S.Ct. 598, 48 L.Ed. 870; Paine Lumber Co. v. Neal, 244 U.S. 459, 37 S.Ct. 718, 61 L.Ed. 1256]. For the like reasons we cannot hold that since a private purchaser is given a remedy for his losses in treble damages, the United States should be awarded the same remedy." United States v. Cooper Corp., supra, 312 U.S. at page 608, 61 S.Ct. at page 745.

The same reasoning requires the conclusion that the omission of the state from the list of those who may maintain the civil action was an intentional restriction. Otherwise stated, the intention not to include the state as a party who may sue to enjoin a violation of the act clearly appears and under such circumstances the rule stated in People v. California Fish Co., 166 Cal. 576, 592, 138 P. 79, has no application.

For these reasons I would affirm the judgment.

SCHAUER, Justice (dissenting.)

I concur in the views expressed by Mr. Justice EDMONDS. It may also be observed that the majority opinion does not mention, but proceeds inconsistently with, the long established rule that "When language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted. In other words, criminal statutes will not be built up 'by judicial grafting upon legislation. * * * [I]t is also true that the defendant is entitled to the benefit of every reasonable doubt, whether it arises out of a question of fact, or as to the true interpretation of words, or the construction of language used in a statute.'" (People v. Ralph (1944), 24 Cal.2d 575, 581, 150 P.2d 401, 404; see also People v. Valentine (1946), 28 Cal.2d 121, 143, 169 P.2d 1; Ex parte Rosenheim (1890), 83 Cal. 388, 391, 23 P. 372; People v. Sayre (1937), 26 Cal. App.2d Supp. 757, 761, 70 P.2d 546).

The trial court reached its judgment by following well established law; that judgment should be affirmed.

Rehearing denied; EDMONDS and SCHAUER, JJ., dissenting.

34 Cal.2d 708

KEENAN v. SAN FRANCISCO UNIFIED SCHOOL DIST. et al.

S. F. 17976.

Supreme Court of California, in Bank.

Feb. 7, 1950.

Proceeding by Grace B. Keenan against San Francisco Unified School District, Board of Education of the San Francisco Unified School District and others, for a writ of mandate to compel re-employment and certification of petitioner as a permanent elementary school teacher.

The Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., entered judgment for defendants, and petitioner appealed.

The Supreme Court, Edmonds, J., held that statute providing that governing boards of school districts having an average daily attendance of 60,000 or more pupils shall dismiss probationary employees for cause only, was not an arbitrary classification, and that petitioner was entitled to a full hearing before her removal.

Judgment reversed.

Prior opinion, 204 P.2d 404.

1. Statutes 🔑72

A law, to be "general" in its scope, need not include all classes of individuals in the state, but answers constitutional requirements if it relates to and acts uniformly upon whole of any single class of individuals or objects, and classification is founded upon some natural, intrinsic, or constitutional distinction.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "General Law".

2. Statutes 🔑71

If good ground for a classification in a statute exists, such classification is not void because it does not embrace within it every other class which might be included.

3. Constitutional law 🔑211

A law does not violate requirement as to equal protection of laws merely because its operation is confined to areas having a designated population.

4. Constitutional law 🔑238(1)

Schools and school districts 🔑46

The statute providing that governing boards of school districts having an average daily attendance of 60,000 or more pupils shall dismiss probationary employees for cause only, is not an unreasonable or arbitrary classification, and does not violate either federal or state constitutional guarantees of equal protection under the laws. Education Code, § 13583.

5. Officers 🔑72(1)

If by statute, an officer or civil service employee may not be removed or discharged except for cause, clear implication is that there be afforded an opportunity for a full hearing to accomplish his removal, and that unless statute expressly negatives necessity of a hearing, common fairness and justice compel inclusion of such a requirement by implication.

6. Schools and school districts 🔑141(5)

Where elementary school teacher, after she had been employed for three consecutive years as probationary teacher in a district having more than 60,000 average daily attendance was notified by letter that her physical condition would not permit her further employment, cause relied upon by school authority should have been specified, and teacher's informal interviews with administrative officers of board of education did not constitute a "hearing" as contemplated by statute, did not amount to a waiver of her right to a hearing, and did not estop her from complaining of a lack of a formal hearing. Education Code, §§ 13582, 13583.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Hearing".

Alexander S. Keenan, Jr., San Francisco, and Albert A. Spiegel, Santa Monica, for appellant.

Carroll, Davis & Freidenrich, San Francisco, as amicus curiae on behalf of appellant.

John J. O'Toole and Dion R. Holm, City Attorneys, Walter A. Dold, Chief Deputy City Attorney, and Irving G. Breyer, San Francisco, for respondents.

Harold W. Kennedy, County Counsel Los Angeles, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, as amicus curiae on behalf of respondents.

EDMONDS, Justice.

Grace B. Keenan, while serving as a probationary teacher in the elementary schools of San Francisco, was dismissed by the Board of Education because of physical disability. Her appeal from the judgment denying a writ of mandamus requiring the school authorities to reemploy her, presents for decision the question as to the right of the Board of Education to terminate her services without a hearing and also challenges the sufficiency of the medical evidence to justify its action.

The parties are essentially in agreement as to the facts, which may be summarized as follows: Mrs. Keenan was appointed a probationary elementary school teacher in the San Francisco Unified School District on September 1, 1942, and commenced her duties on February 1, 1943. She taught the balance of that school year and, in the fall term, until October 10th, when she became ill of diabetes.

Because of her illness, Mrs. Keenan applied for and was granted a leave of absence. She resumed her duties February 1, 1944. Thereafter she taught for a period of three and one-half years without once being absent. During that time, she received the highest efficiency ratings.

On March 28, 1947, Mrs. Keenan was notified that her services would be terminated as of the following June 30th. This action was taken by the school authorities upon a medical history commencing about the time she obtained her leave of absence for illness. The record shows that she became a diabetic in October, 1943. Her physician informed the school authorities that she had experienced a diabetic coma, and would be unable to teach for at least six weeks. When she returned to duty, approximately two months later, she was examined by Dr. Yoell, acting for the Board of Education. During the examination she informed Dr. Yoell that she had diabetes and was receiving treatment from Dr. Shepardson, a specialist in that field.

Dr. Yoell made no special examination for diabetes but he obtained a written report from Dr. Shepardson as to Mrs. Keenan's condition. Thereupon, Dr. Yoell certified to the school authorities that she was "physically capable" of performing her duties.

In January, 1947, Mrs. Keenan again was examined by Dr. Yoell in order to determine her fitness for permanent tenure. By that time, Dr. Yoell had been informed by Dr. Shepardson that Mrs. Keenan was a "fixed diabetic" under regular insulin treatment. Because of the diabetic condition, Dr. Yoell refused to certify her as meeting the requirements for permanent status but he found her to be physically fit for temporary work.

Mrs. Keenan learned of Dr. Yoell's conclusions and, by letter of her counsel addressed to the Board of Education, protested his recommendation. The board then requested the superintendent to reinvestigate the matter and refer it to the board's physician. On March 26, 1947, the Board of Examiners approved Dr. Yoell's determination. Mrs. Keenan was not present nor was she represented at the meeting of either board which considered the advisability of continuing her employment.

Mrs. Keenan was advised of this action by letter and informed that she would be dropped from the probationary list as of June 30th. The letter also stated that "Because of your acknowledged success as a superior teacher we greatly regret the necessity of the above action. In the event that you care to work as a substitute teacher, will you please notify us so that we can arrange assignments suitable to you."

Formal action dismissing Mrs. Keenan was taken by the Board of Education at a meeting on May 6, 1947. Mrs. Keenan was not notified of the meeting and was not present. The resolution adopted by the board recites that because she "has not been approved by the physician employed by the Board of Education for permanency on the basis of her physical condition * * * her dismissal is deemed necessary as being for the welfare of the schools and pupils thereof". It was stipulated at the trial that she was not accorded a hearing before the board.

Mrs. Keenan then filed her petition for a writ of mandate to require the Board of Education to reemploy her, to certify that she is a permanent elementary school teacher, and to reimburse her for salary due since the date of discharge. An alternative writ was issued. When the matter came on for trial, her demand for a trial by jury was denied upon the ground that such a request presents a question for the exercise of judicial discretion and that the issues for determination were mixed questions of law and fact. Upon the evidence which has been stated, the trial court held that the dismissal was not arbitrary, but related solely to the welfare of the schools and pupils; also, that it was authorized by and made in compliance with the provisions of the Education Code. The appeal is from the judgment subsequently entered discharging the alternative writ of mandate and denying Mrs. Keenan any relief.

Mrs. Keenan's principal ground for reversal of the judgment is that she was not accorded a hearing as required by section 13583 of the Education Code. The Board of Education and its members take the position that it acted reasonably in refusing permanent tenure to a diabetic teacher and in the interest of "* * * the welfare of the schools and the pupils thereof (sec. 13583, Cal.Education Code)." They did more than was necessary, it is argued, prior to dismissing the appellant under the provisions of sections 13582 and 13583, Cal. Education Code. No hearing was requested by her attorney and none is required; in fact, it is claimed, she was given notice and accorded a hearing. To hold otherwise, it is said, would afford a probationary teacher in a district of 60,000 average daily attendance more protection than that enjoyed by a permanent teacher.

As amicus curiae in support of the San Francisco School Board, the Board of Education of Los Angeles contends that section 13583 of the Education Code is invalid because it is special legislation enacted contrary to the provisions of the state Constitution. A second ground of attack is that the statute is based upon an unreasonable classification contrary to the provisions of the equal protection clause of the federal Constitution.

The Education Code provides: "On or before the fifteenth day of May in any year the governing board may give notice in writing to a probationary employee that his services will not be required for the ensuing year." Sec. 13582. "Anything in Section 13582 to the contrary notwithstanding, governing boards of school districts having an average daily attendance of 60,000 or more pupils shall dismiss probationary employees for cause only. The determination of the board as to the sufficiency of the cause for dismissal shall be conclusive, but the cause shall relate solely to the welfare of the schools and the pupils thereof." Sec. 13583.

The intention of the Legislature to make a different requirement for the dismissal of probationary teachers in a large district than that applicable in areas having a smaller population is clearly manifested by the imperative words, "Anything in Section 13582 to the contrary notwithstanding * * *" and by the use of the explicit numerical designation. Further evidence of the legislative purpose is the fact that section 13581 of the Education Code, which relates to dismissal during the school year for cause, is applicable without qualification to every probationary teacher regardless of the size of the school district in which he is employed.

[1, 2] "'A law, to be general in its scope,' * * * 'need not include all classes of individuals in the state. It answers the constitutional requirements if it relates to and acts uniformly upon the whole of any single class of individuals or objects, and the classification is founded upon some natural, intrinsic, or constitutional distinction. * * * If good ground for the classification exists, such classification is not void because it does not embrace within it every other class which might be included.'" Powers Farms v. Consolidated Irr. Dist., 19 Cal.2d 123, 131, 119 P.2d 717, 722, quoting with approval, Heron v. Riley, 209 Cal. 507, 518, 289 P. 160.

[3, 4] It is common practice, upheld by the courts almost without exception, to use population as a basis for the determination of areas in which particular requirements shall apply. A law does not violate the requirement as to the equal protection of the laws merely because its operation is confined to areas having a designated population and upwards. Mason v. Missouri, 179 U.S. 328, 21 S.Ct. 125, 45 L.Ed. 214; Tucker v. Barnum, 144 Cal. 266, 77 P. 919; Douglas v. People, 225 Ill. 536, 80 N.E. 341, 8 L.R.A.,N.S., 1116, 116 Am.St.Rep. 162. Many different reasons justify such classification. A probable reason for the legislative action here challenged is that, in the larger school districts, usually the probationary teacher is personally unknown to the members of the school board. Under such circumstances, notice and hearing before discharge reasonably may be imposed as a condition of such action. On the other hand, in the smaller districts where, more or less, the teachers are well known in the community, a requirement for the formal presentation of charges against a teacher who has been employed on a trial basis is not so necessary to insure a fair administration of the school system. Certainly the classification fixed by section 13583 of the Education Code is neither arbitrary nor unreasonable and does not violate either the federal or state constitutional guarantees.

[5] Considering the merits of Mrs. Keenan's position, since the decision in Bannerman v. Boyle, 160 Cal. 197, 116 P. 732, it has repeatedly been held "* * * that if by statute an officer or civil service employee may not be removed or discharged except for cause, the clear implication is that there be afforded an opportunity for a full hearing to accomplish his removal; that unless the statute expressly negatives the necessity of a hearing, common fairness and justice compel the inclusion of such a requirement by implication." Steen v. Board of Civil Service Commissioners, 26 Cal.2d 716, 723, 160 P.2d 816, 820; see also Ratliff v. Lampton, 32 Cal.2d 226, 195 P.2d 792; Covert v. State Board of Equalization, 29 Cal.2d 125, 173 P.2d 545; Carroll v. California Horse Racing Board, 16 Cal.2d 164, 105 P.2d 110; Welch v. Ware, 161 Cal. 641, 119 P. 1080. The Legislature has specified that the probationary teacher in the larger school districts shall not be dismissed without notice and hearing. In doing so, it enlarged the rights of such teachers, but it did not entirely change their status. Although a permanent teacher may be dismissed only for the causes enumerated in section 13521 of the Education Code (immoral or unprofessional conduct, dishonesty, evident unfitness for service, conviction of a felony or of any crime involving moral turpitude, and similar offenses), the probationary teacher in the larger school districts may be "dismissed for cause", § 13583, Education Code. Under these statutory provisions, the probationary teacher in a district having pupils in excess of the specified number may be dismissed for much less cause than that justifying charges against a permanent teacher. For example, the failure to conform with a reasonable standard of excellence during the probationary period may constitute a sufficient cause for terminating the employment.

An additional difference between the status, in a district having more than 60,000 students, of a probationary teacher and that of one who has completed three years of service lies in the procedure authorized by the Legislature for the removal of such persons. The one who has completed the probationary term of teaching can be dismissed over his objection only by a judgment of the superior court in a proceeding brought by the governing board. Education Code, sec. 13529. For the reasons which have been stated, a probationary teacher is subject to dismissal by the governing board, with whatever rights the law allows to a review of the administrative proceeding in the superior court. See: La Prade v. Department of Water and Power, 27 Cal.2d 47, 162 P.2d 13; Steen v. Board of Civil Service Com'rs, 26 Cal.2d 716, 160 P.2d 816.

[6] Mrs. Keenan was a probationary teacher in a district having more than 60,000 average daily attendance and she could not be dismissed except for cause upon notice and hearing. Physical disability may well be a cause within the meaning of the statute. But the cause relied upon by the school authorities must be specified and a hearing afforded the teacher to meet the charge. Mrs. Keenan's informal interviews with administrative officers of the Board of Education did not constitute a hearing as contemplated by the statute, nor did they amount to a waiver of her right to a hearing or estop her from complaining of a lack of hearing.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

34 Cal.2d 715

HEFFERAN v. FREEBAIRN.

FREEBAIRN v. HEFFERAN.

L. A. 20739, 20740.

Supreme Court of California, in Bank.

Feb. 10, 1950.

Rehearing Denied March 6, 1950.

Action by Raymond L. Hefferan against J. Ray Freebairn to rescind a contract for the sale of a restaurant business, consolidated with an action by J. Ray Freebairn against Raymond L. Hefferan to foreclose a chattel mortgage.

The Superior Court for Los Angeles County, Ellsworth Meyer, Judge pro tem,* rendered judgments for Raymond L. Hefferan, and J. Ray Freebairn appealed.

The Supreme Court, Traynor, J., held that the buyer of the restaurant was justified in relying on misrepresentations and that these were sufficiently proved to justify rescission, and that the buyer did not waive his right to rescind.

Judgments affirmed.

Prior opinions 207 P.2d 602; 207 P.2d 607.

1. Contracts 🔑267

Negligence on part of plaintiff in failing to discover falsity of a statement is not a defense to action to rescind a contract when misrepresentation was intentional rather than negligent; and plaintiff is not held to the standard of precaution or of minimum knowledge of a hypothetical reasonable man; but if conduct of plaintiff in light of his own intelligence and information was manifestly unreasonable, he will be denied a recovery.

2. Sales 🔑38(7)

A buyer is not required to employ experts to investigate matters of a technical nature as to which seller has full knowledge and buyer none; and if for this reason the investigation is incomplete, he may show that he relied upon representations as to matters which he did not investigate.

3. Sales 🔑38(7)

A buyer is not chargeable with knowledge of conditions that he fails to discover because of some artifice or deception of seller.

4. Appeal and error 🔑1011(1)

Where there is substantial evidence offered by parties to support conflicting versions of fact, and Supreme Court cannot say trial court was compelled by the evidence to find for one party or the other, Supreme Court must accept trial court's finding.

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* Assigned by Chairman of Judicial Council.

5. Sales 🔑52(7)

In buyer's action to rescind contract for sale of restaurant business, evidence supported findings to the effect that buyer without knowledge of restaurant business inspected false records showing profits and loss, and hence buyer was justified in relying on seller's statements in making purchase.

6. Sales 🔑114

To rescind a contract for purchase of property purchaser need not be able to show that property purchased was worth less than he paid for it; but it is enough that he was induced, by false representations, to buy property which would, if representations had been true, have been worth more than it actually was worth.

7. Contracts 🔑259

In an action to rescind a contract for fraud, plaintiff need not plead or prove pecuniary loss, so long as record indicates that there was an injury or prejudice resulting from the fraud.

8. Sales 🔑114

Where buyer brought action to rescind contract for sale of restaurant and showed that he received a business earning less than $10,000 a year although seller represented it as earning $20,000, sufficient injury was shown to justify rescission.

9. Appeal and error 🔑1008(1)

In buyer's action to rescind contract for sale of restaurant business, defense of waiver raised an issue of fact to be decided after consideration of all circumstances of the particular case, and was a question primarily for the trial court.

10. Sales 🔑121

Where seller misrepresented to buyer of restaurant business that profits were higher that those actually earned, and buyer had control from first day of the month until he gave notice of rescission on the twenty-eighth, and profits were calculated on a monthly basis and rebates paid monthly, 28-day delay did not of itself amount to waiver of right to rescind.

11. Appeal and error 🔑989

In buyer's action to rescind contract for sale of restaurant business, payments made by buyer on note after giving notice of rescission merely constituted facts to be considered by the trial court in determining whether buyer had ratified transaction or waived seller's misrepresentations.

12. Sales 🔑121

Where buyer of restaurant business gave notice of rescission on ground of misrepresentation as to profits, and thereafter made two payments on note to prevent default on note and mortgage, and seller was not misled or injured by any undue delay in giving notice, buyer did not waive right to rescind.

W. I. Gilbert, Jr., and Henry E. Kappler, Los Angeles, for appellant.

Boller, Suttner & Boller, and T. R. Suttner, Arcadia, for respondent.

TRAYNOR, Justice.

On or about December 20, 1946, plaintiff, R. L. Hefferan, entered into a contract to purchase the "Gilray Coffee Shop" from defendant, J. R. Freebairn. He paid $20,000 in cash and $35,000 in the form of a promissory note secured by a chattel mortgage. Plaintiff took possession of the coffee shop on January 1, 1947; the escrow was closed on January 7, 1947. Plaintiff gave defendant a check for the inventory about January 27, 1947. On January 28, 1947, he served notice of rescission. A certificate of Business Under a Fictitious Name was filed by plaintiff on January 29, 1947, and thereafter he continued to operate the cafe. On February 1, 1947, and March 1, 1947, he made two payments of $1,000 each on the promissory note. Defendant did not accept the offer of rescission. On March 17, 1947, plaintiff filed this action to rescind the contract, to cancel the note and mortgage, and to obtain restitution of his cash payment. Defendant subsequently brought an action to foreclose the chattel mortgage, and the two actions were consolidated. Judgments were entered for plaintiff, and defendant appeals.

As grounds for rescission, plaintiff alleged that defendant stated that the Gilrav Coffee Shop would net over $20,000 profit for 1946 and made other misrepresentations. Plaintiff further alleged that all the representations were false and fraudulent and that he relied upon them and was thereby induced to enter into the agreement. The evidence on these matters is contradictory.

Plaintiff testified in full support of the allegations. Defendant denied ever having made the statements in question. Both agreed that they visited defendant's accountant on December 19, 1946, for the purpose of inspecting the records of the coffee shop. They agreed that the inspection was limited to the profit and loss statements for the first ten months of 1946 and gross sales records for November and part of December, 1946. Plaintiff testified that both defendant and his accountant assured him that the profits made by the business were really higher than those shown on the statements, but both defendant and the accountant denied giving any such assurance. Plaintiff further testified that the profit and loss statements showed a profit of about $8,000 instead of $16,000, but that when he asked defendant to explain the discrepancy, defendant told him that there were rebates from suppliers not shown on the statements. Defendant admitted discussing rebates but testified that they were reflected in the books of the coffee shop. Plaintiff testified that the payments made on the note after giving notice of rescission were made with the intention of protecting himself from default on the chattel mortgage.

The trial court resolved all issues of credibility and made all inferences from the testimony in favor of plaintiff. It was found that to induce plaintiff to purchase the cafe defendant made, among others, the following misrepresentations: that the business would earn $20,000 for the year 1946 and that defendant had already taken $16,000 out of the business up to and including October, 1946. The court further found that plaintiff relied on the representations and would not have purchased the cafe had he not believed them to be true; that the representations were untrue; that the cafe earned only $5,666.25 during the first eleven months of 1946, $387.19 during December, and that defendant had taken only $10,115 out of the business up to and including October, 1946; that plaintiff discovered the falsity of the representations after taking possession of the business; that in the course of an inspection of defendant's records, plaintiff saw only profit and loss statements for the first ten months of 1946 and gross sales records for November and part of December, 1946; that these records indicated a profit of only $5,666.25; that before any agreement by the parties, defendant had represented that the profits were much larger than those shown on the statements, inasmuch as profits were earned from trade rebates that were not accounted for in the statements. The trial judge further found that the two payments of $1,000 on account of the purchase price after giving notice of rescission were made for the purpose of preventing a default on the note and mortgage pending negotiations concerning plaintiff's notice of rescission and were not intended by him as a waiver of his rights under the notice.

Three issues of law are presented to this court. (1) Was the plaintiff justified in relying on the misrepresentations? (2) Did the plaintiff prove sufficient injury resulting from defendant's fraud to justify rescission? (3) Did the plaintiff waive the right to rescind by the payments on the note or by other actions?

I. Defendant contends that plaintiff is precluded from rescinding the contract by virtue of the knowledge that he acquired or should have acquired in the course of the negotiations with defendant.

[1] The standards by which the buyer's acts must be judged were set forth by this court in Seeger v. Odell, 18 Cal.2d 409, 115 P.2d 977, 980, 136 A.L.R. 1291. "Negligence on the part of the plaintiff in failing to discover the falsity of a statement is no defense when the misrepresentation was intentional rather than negligent. * * * Nor is a plaintiff held to the standard of precaution or of minimum knowledge of a hypothetical, reasonable man. Exceptionally gullible or ignorant people have been permitted to recover from defendants who took advantage of them in circum-

stances where persons of normal intelligence would not have been misled. (Authorities cited.) 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.' * * * If the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, however, he will be denied a recovery." Seeger v. Odell, 18 Cal.2d 409, 414-415, 115 P.2d 977, 136 A.L.R. 1291. The necessary implication of the findings and judgment below is that plaintiff's reliance was justified. Finding IV states: "The plaintiff believed and relied upon each and all of the foregoing representations made by defendant and was thereby induced to purchase said Cafe. Plaintiff would not have purchased said Cafe had he not believed that each of said representations was true. At said time plaintiff had never been in the restaurant business, and possessed no special knowledge or information concerning restaurant fixtures and the restaurant business except some experience gained in the army." In Finding XVII the court states: "It is true that plaintiff inspected certain records of defendant pertaining to the profit and loss of said business but in this connection the Court finds that plaintiff was shown only profit and loss statements for the first ten months of 1946 and gross sales records for November and part of December, 1946." Finally, the court found that after plaintiff saw the statements indicating a smaller profit than had been represented, defendant explained the discrepancy by the fact that trade rebates were not shown in the statements.

[2, 3] The defendant relies on Carpenter v. Hamilton, 18 Cal.App.2d 69, 71, 62 P.2d 1397, 1399, where the court said, "If it fairly appears from the evidence that the buyer undertook to investigate for himself the matters as to which representations had been made, he cannot be allowed to later claim that he acted upon the representations, even though he voluntarily abandoned his investigation before it was completed." In the Carpenter case, however, the defects in the property conveyed were immediately visible upon the most cursory inspection by one taking possession of the realty. The misrepresentations of earnings in the present case fall into a category for which the Carpenter case makes a specific exception, i. e., "that a buyer is not required to employ experts to investigate matters of a technical nature as to which the seller has full knowledge and the buyer none, and if for this reason the investigation is incomplete, he may show that he relied upon the representations as to matters which he did not investigate." Cf. Shearer v. Cooper, 21 Cal.2d 695, 703, 704, 134 P.2d 764; Bagdasarian v. Gragnon, 31 Cal.2d 744, 748, 192 P.2d 935. In the light of the court's finding that plaintiff accepted defendant's reference to rebates as an explanation of the low profit shown on the accounting statements, another exception specified in the Carpenter case applies, namely, that a buyer is not chargeable with knowledge of conditions that he fails to discover because of some artifice or deception of the seller.

[4, 5] More closely analogous on its facts to the present case is Davis v. Butler, 154 Cal. 623, 98 P. 1047, involving a sale of a controlling interest in a bottling company, which was rescinded because the seller of the stock had misrepresented the amount of the corporation's indebtedness. The court said: "The rule that a party may not complain of misrepresentations regarding matters which he has investigated, or, having the opportunity so to do, has begun to investigate for himself * * * has no application here. While the plaintiff, before purchasing, looked over the books of the corporation, the court finds (and the finding is not challenged) that defendant stated to plaintiff that neither he nor the corporation kept any books of account showing the corporate indebtedness. The plaintiff was fully justified in relying upon defendant's statements as to such indebtedness." 154 Cal. 623, 627, 98 P. 1047, 1049. There was substantial evidence offered by the parties in the present case to support the conflicting versions of the facts. We cannot say that the trial court was compelled by the evidence to find for the defendant and we must therefore accept its finding.

Since there was one material misrepresentation justifiably relied on by the plaintiff, there is no necessity for a discussion of the other misrepresentations made by the defendant. See, 12 Cal.Jur. 741.

[6-8] II. The second major issue in this case is: Did the plaintiff prove that sufficient injury resulted from defendant's fraud to justify rescission? In Davis v. Butler, 154 Cal. 623, 627, 98 P. 1047, 1049, the court stated: "It is not essential to the right to rescind a contract for the purchase of property that the purchaser should be able to show that the property purchased was worth less than he paid for it. It is enough that he was induced, by false representations, to buy property which would, if the representations had been true, have been worth more than it actually was worth. Spreckels v. Gorrill, [152 Cal. 383, 92 P. 1011]." It is obvious that receiving a business earning less than $10,000 a year constitutes a substantial injury to a buyer to whom it was represented as earning $20,000. The plaintiff need not plead or prove pecuniary loss, so long as the record indicates that there was an injury or prejudice resulting from the fraud. Dunn v. Stringer, 41 Cal.App.2d 638, 107 P.2d 411. The case of Darrow v. Houlihan, 205 Cal. 771, 272 P. 1049, does not militate against this conclusion. There, the defendants believed themselves defrauded because they learned that the land they had contracted to acquire in an exchange was encumbered by a trust deed different in its term from the mortgage that the plaintiff real estate broker had represented was on the realty. The defendants refused to perform and the plaintiff sued for and recovered his commission. The court held that the defendants had shown no injury. "It is not shown, nor have the defendants attempted to show, that had the sixty-day period allowed to the Littles [vendors] by the exchange agreement to comply with its provisions been permitted to elapse the defendants would not have received that for which they had bargained and upon the exact terms and conditions specified. * * * It cannot now be said that the Littles' property would not have come to the defendants within or at the expiration of the period fixed in the agreement, subject to a mortgage incumbrance in the sum of $2,000. The plaintiff, if he had not been precluded by defendants' abandonment of the transaction, might have made, with the assistance of the Littles, all necessary adjustments prior to the expiration of the period fixed by the exchange agreement." 205 Cal. 771, 775, 272 P. 1049, 1050. In the present case, the sale was consummated, and plaintiff did in fact receive less than what had been represented to him he would receive.

[9, 10] III. The third issue raised by the facts is: Did plaintiff waive his right to rescind by making two payments on the note after giving notice of rescission, or by his other action or inaction in the case? The defense of waiver raises an issue of fact to be decided after a consideration of all the circumstances of the particular case, and is a question primarily for the trial court. French v. Freeman, 191 Cal. 579, 217 P. 515; Schied v. Bodinson Mfg. Co., 79 Cal.App.2d 134, 179 P.2d 380. Did plaintiff delay an unreasonable length of time before giving notice of rescission? In French v. Freeman, supra, the court held that the lapse of four months before rescission after discovery of the first misrepresentation did not, as a matter of law, constitute a waiver of frauds discovered subsequently. The critical misrepresentation in the present case was that of profits higher than those actually earned by the Coffee Shop. Plaintiff had control of the restaurant from January 1, 1947; he gave notice of rescission on January 28, 1947. Since the profits were calculated on a monthly basis and the rebates paid monthly, the interval of twenty-eight days from the assumption of control to the attempted rescission would permit an inference of scrupulous promptness as easily as one of undue delay.

[11, 12] Since plaintiff had not waived his rights up to the notice of rescission on January 28, 1947, waiver can only be predicated on his acts after giving notice. Filing a Certificate of Business Under Fictitious Name in compliance with Civil Code section 2466 cannot be said to require the trial court to make a finding of waiver as a matter of law. Similarly, the pay-

ments on the note after giving notice merely constitute facts to be considered by the trial court in determining whether the plaintiff had ratified the transaction or waived the fraud. Switzler v. Klein and Co., 94 Cal.App. 410, 271 P. 367; Cameron v. Evans Securities Corp., 119 Cal.App. 164, 6 P.2d 272; Munson v. Fishburn, 183 Cal. 206, 190 P. 808. The trial court made an express finding that the payments made by plaintiff were for the purpose of preventing a default on the note and mortgage, and were not intended as a waiver of his rights under the notice of rescission. There is substantial evidence to support this interpretation of plaintiff's acts and no evidence that defendant was misled or injured by any undue delay in giving notice of rescission. See Esau v. Briggs, 89 Cal.App.2d 427, 201 P.2d 25.

The judgments are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.

PEOPLE v. YOUNG.

Cr. 4422.

District Court of Appeal, Second District, Division 2, California.

Feb. 14, 1950.

Hearing Granted March 16, 1950.*

Lillian Young was convicted in the Superior Court of Los Angeles County, Thomas L. Ambrose, J., sitting without a jury, of buying or receiving stolen property, and secreting or disposing of stolen property after demand for return, and she appealed.

The District Court of Appeal, McComb, J., held that where notice of appeal was filed more than 10 days after granting of probation by trial court, court was without jurisdiction to consider appeal.

Appeal dismissed.

Criminal law 🔑1081

Where notice of appeal was filed more than 10 days after making of order granting defendant's application for probation, notice of appeal was not filed within time prescribed by law and District Court of Appeal was without jurisdiction to consider appeal. Pen.Code, § 496; Rules on Appeal, rule 31.

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Walter L. Gordon, Jr., Los Angeles, for Appellant.

Fred N. Howser, Attorney General; Dan Kaufmann, Deputy Attorney General, for Respondent.

McCOMB, Justice.

From an order denying defendant's motion for a new trial after she had been convicted by the court, sitting without a jury, of violating section 496 of the Penal Code, she appeals.

Facts: On March 11, 1949, defendant was found guilty of a violation of section 496 of the Penal Code. On April 26, 1949, the trial court granted defendant's application for probation and without pronouncing judgment or sentence suspended further proceedings in the case. On August 2, 1949, defendant made a motion for a new trial which was denied. It is from this order that the present appeal is taken. Respondent moves to dismiss the appeal upon the ground that it was not taken within the time provided by Rule 31 of the Rules on Appeal. (22 Cal.2d 22.)

This motion must be granted for the reason that Rule 31 of the Rules on Appeal provides in part as follows: "* * * Notice of appeal from an order denying a new trial shall be filed within 10 days after the making of an order granting probation or the rendition of judgment, whichever shall occur sooner. * * *" In the instant case a judgment was not rendered. Probation was granted on April 26, 1949, and the notice of appeal was not filed until August 2, 1949, more than 3 months after the order granting probation was made. Hence the notice of appeal was not filed within the time prescribed by law, and this court is without jurisdiction to consider the appeal. (People v. Behrmann, 34 Cal.2d 459, 211 P.2d 575.)

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* Subsequent opinion 221 P.2d 13.

The appeal is dismissed.

MOORE, P. J., and WILSON, J., concur.

95 Cal.App.2d 766

PENDELL v. WESTLAND LIFE INS. CO.

Civ. 17130.

District Court of Appeal, Second District,
Division 3, California.
Jan. 27, 1950.

Harry G. Pendell brought action against the Westland Life Insurance Company, a corporation, to recover on a health and accident policy providing for payment of monthly indemnity for period up to five years but providing for only one month's indemnity for hernia.

The Superior Court of San Luis Obispo County, Ray S. Lyon, J., rendered a judgment for the plaintiff, and the defendant appealed.

The District Court of Appeal, Vallée, J., held that policy was ambiguous as to whether the word "hernia" in the policy included an esophageal hiatus diaphragmatic hernia, that evidence was admissible to aid in construction of the word "hernia" and that evidence sustained finding that an esophageal hiatus diaphragmatic hernia was not within meaning of the word "hernia" as used in policy, and that the admission of certain evidence, on ground that it was an admission by defendant, was error, but was not prejudicial error.

Affirmed.

1. Insurance 🔑146(2)

The terms of a contract of insurance constitute the measure of the insurer's liability and should be construed according to the language used therein.

2. Insurance 🔑146(2)

Where language in a contract of insurance is unambiguous, the language is to be construed according to its plain meaning.

3. Insurance 🔑146(1)

A contract of insurance is to be construed so as to give effect to the intention of the parties at the time of contract, so far as the intention is ascertainable. Civ.Code, § 1636.

4. Insurance 🔑146(3)

Where the language of an insurance contract is susceptible of two constructions, it should be construed most strongly in favor of the insured.

5. Insurance 🔑146(3)

A contract of insurance must be given such construction, if fairly warranted, as will best carry out the object for which the contract was entered into, namely, that of securing indemnity to the insured for the losses to which the insurance relates.

6. Insurance 🔑146(3)

Indemnification of the insured should be effected rather than defeated, and to that end the law makes every rational intendment in order to give full protection to the interests of the insured.

7. Insurance 🔑146(3)

Where exceptions in a contract of insurance purport to limit risk assumed by insurer in the general provisions of the contract, exceptions are to be construed most strongly against the insurer and in favor of the insured and, if susceptible of two meanings, the one most favorable to the insured is to be adopted.

8. Insurance 🔑146(3)

An insurer is bound to use such language as to make exceptions and provisions of contract of insurance clear to the ordinary mind, and, in case it fails to do so, any uncertainty or reasonable doubt is to be resolved against insurer.

9. Insurance 🔑146(3)

If there is doubt whether words of a contract of insurance were used in an enlarged or restrictive sense, other things being equal, a construction will be adopted which is most beneficial to the insured.

10. Insurance ⚷668(3)

Where somewhat technical language in a policy, or, if not technical, at least colored by the meaning attributed to it by medical men, with which laymen are more or less unacquainted, is to be construed, the meaning thereof, with all the circumstances in mind, should be left to the trier of facts, and no hard and fast rule should be laid down as to what the language means.

11. Insurance ⚷146(2)

Unless it is obvious that word was used in policy in technical sense, word will be given the meaning that common speech imports. Civ.Code, § 1644.

12. Evidence ⚷450(5)

If language employed in a contract be fairly susceptible of either one of two interpretations contended for, without doing violence to its usual and ordinary import, or some established rule of construction, then an ambiguity arises, which extrinsic evidence may be resorted to for the purpose of explaining.

13. Insurance ⚷530

The word "hernia" as used in health and accident policy providing for payment of monthly indemnity for period up to five years but providing for only one month's indemnity for "hernia", was to be construed in its popular sense, and should be taken as an average person, with usual and ordinary intelligence, would understand it, rather than in its technical or scientific sense. Civ.Code, § 1644.

14. Evidence ⚷450(5)

The word "hernia" as used in health and accident policy providing for payment of monthly indemnity for period up to five years but providing for only one month's indemnity for "hernia" classified by the policy as "sickness" was uncertain and ambiguous in meaning, and therefore extrinsic evidence was properly considered in construing the policy. Civ.Code, §§ 1636, 1644.

15. Insurance ⚷665(5)

Evidence sustained finding that word "hernia" as used in health and accident policy providing for payment of monthly indemnity for period up to five years but providing for only one month's indemnity for "hernia" classified by policy as "sickness", did not include an "esophageal hiatus diaphragmatic hernia" which is a hernia occurring where the peritoneal sac covering stomach slides up into membranous partition separating thoracic cavities, and therefore insured was not limited to one month's indemnity.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Esophageal Hiatus Diaphragmatic Hernia" and "Hernia".

16. Evidence ⚷200

An "admission" is a statement, oral or written, suggesting any inference as to any fact in issue, or relevant, or deemed to be relevant, to any such fact, made by or on behalf of any party to any proceeding.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Admission".

17. Evidence ⚷272

The declaration of a party, to be admissible against him, must tend to prove the fact in issue, and must be relevant to, and have a material bearing on, the issues in the case, and must concern the subject matter of the controversy.

18. Evidence ⚷201

A declaration which does not, under any reasonable construction, appear to admit or acknowledge the fact which is sought to be proved by it, is not competent as an admission.

19. Appeal and error ⚷1050(1)
Evidence ⚷215(1)

In action on health and accident policy to recover indemnity for esophageal hiatus diaphragmatic hernia, which insured contended did not come within term "hernia" for which insurer was liable for only one month's indemnity, admission of a rider issued for such policies after insured's accident on payment of additional premium, for purpose of establishing insured's contention, on ground that rider was an "admission" by insurer, was error, but was not prejudicial were merely cumulative.

20. Evidence ⚷20(1)

It is common knowledge that insurance companies issue a great variety of policies and riders and frequently change them from time to time and also from time to time offer additional benefits for additional premiums.

◆

Webb, Webb & Crites, Hester Webb, and Reed Crites, San Francisco, for appellant.

Newell & Chester, Los Angeles, for respondent.

VALLEE, Justice.

Appellant, defendant below, appeals from a judgment for plaintiff in an action for a declaration of his rights under a contract of health and accident insurance.

June 21, 1943, appellant issued a policy of insurance called "Employees Income Policy (Non-Occupational)" by which it agreed to indemnify respondent for specified losses. In part it read that if respondent, while the policy was in force, should sustain loss resulting directly and independently from all other causes from accidental bodily injury which did not arise out of or was not sustained in the course of employment for compensation, profit or gain, and if such injury within twenty days of the date of the accident totally and continuously disabled respondent, appellant would pay respondent a monthly indemnity of $100 a month, as long as he was so disabled, not exceeding five years. It also indemnified respondent against loss occurring while the policy was in force resulting from bodily disease, the cause of which originated more than thirty days after the date of the policy "hereinafter referred to as 'such sickness' ". The amount of the indemnity was set forth in Part 1.

Part 16(C) in part read: "Under the terms of this policy, lumbago, sprained or lame back, or hernia shall be classified as 'such sickness.' The only indemnity payable for hernia shall be one month's indemnity under Part 10(A) or (B), [$100] and then only in the event of a necessary herniotomy."

In a "First Day Coverage Rider," a part of the policy, appellant agreed that the various indemnities referred to in the policy would be paid as of the first day of injury.

In a "Surgical Operation Fees Rider," a part of the policy, appellant agreed to pay the actual expense incurred for "Hernia—Cutting operation for radical cure of Single hernia . . . 50.00 More than one hernia . . . 75.00".

February 5, 1946, while the policy was in force, respondent accidentally sustained an "esophageal hiatus diaphragmatic hernia" (the peritoneal sac covering the stomach slid up into the membranous partition separating the thoracic cavities), nonoccupational in nature. He has been totally disabled since that date. He submitted to an operation. Appellant paid respondent one month's indemnity of $100 and a $50 surgical fee.

The court found that the parties did not intend to include an "esophageal hiatus diaphragmatic hernia" within the meaning of the word "hernia" as used in Part 16(C). Judgment was for respondent for $100 a month from one month after the accident to the time of trial.

Appellant's specifications of error are: 1. The word "hernia" as used in the policy includes an "esophageal hiatus diaphragmatic hernia" as a matter of law. 2. The court erred in admitting in evidence a specimen of a special "Surgical Operation Fees Rider" issued by appellant in April, 1946.

If the word "hernia," as used in the policy, includes an "esophageal hiatus diaphragmatic hernia," respondent was fully paid. If it does not he is entitled to $100 a month for five years.

The first specification of error is, in effect, that the word "hernia" as used in the policy is unambiguous; and that parol evidence, admitted without objection, to aid the court in construing the contract, may not be considered. The clause in the policy providing that the indemnity payable for "hernia" shall be for one month is an exception to the general indemnity provided by the policy.

[1, 2] The terms of a contract of insurance constitute the measure of the in-

surer's liability and should be construed according to the language used therein. Pacific Heating & Ventilating Co. v. Williamsburgh City Fire Ins. Co., 158 Cal. 367, 369, 111 P. 4; Coit v. Jefferson Standard Life Ins. Co., 28 Cal.2d 1, 168 P.2d 163, 168 A.L.R. 673. Language which is clear and unambiguous is to be construed according to its plain meaning. Guidici v. Pacific Automobile Ins. Co., 79 Cal.App.2d 128, 134, 179 P.2d 337.

[3-6] A contract of insurance, like any other contract, is to be construed so as to give effect to the intention of the parties at the time of contracting so far as it is ascertainable. Civ.Code, sec. 1636. Where the language is susceptible of two constructions, it should be construed most strongly in favor of the insured. Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 424, 213 P. 42, 26 A.L.R. 123; Island v. Fireman's Fund Indemnity Co., 30 Cal. 2d 541, 548, 184 P.2d 153, 173 A.L.R. 896. A contract of insurance must be given such construction, if fairly warranted, as will best carry out the object for which the contract was entered into, namely, that of securing indemnity to the insured for the losses to which the insurance relates. Fageol Truck & Coach Co. v. Pacific Indemnity Co., 18 Cal.2d 748, 751, 117 P.2d 669. Indemnification of the insured should be effected rather than defeated. "To that end the law makes every rational intendment in order to give full protection to the interests of the insured." Glickman v. New York Life Ins. Co., 16 Cal.2d 626, 635, 107 P.2d 252, 256, 131 A.L.R. 1292.

[7, 8] Exceptions in a contract of insurance which purport to limit the risk assumed by the insurer in the general provisions thereof are to be construed most strongly against the insurer and in favor of the insured and if susceptible of two meanings, the one most favorable to the insured is to be adopted. Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 424, 213 P. 42, 26 A.L.R. 123; Bayley v. Employers' Liability Assur. Corp., 125 Cal. 345, 352, 58 P. 7. The insurer is bound to use such language as to make the exceptions and provisions of the contract clear to the ordinary mind; and in case it fails to do so, any uncertainty or reasonable doubt is to be resolved against it. Pacific Heating & Ventilating Co. v. Williamsburgh City Fire Ins. Co., 158 Cal. 367, 370, 111 P. 4.

Civil Code section 1644 says that "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

[9-11] If the language may be understood in more than one sense, it is to be construed against the insurer and in favor of the insured. Bayley v. Employers' Liability Assur. Corp., 125 Cal. 345, 352, 58 P. 7. If there is doubt whether words of a contract of insurance were used in an enlarged or restrictive sense, other things being equal, the construction will be adopted which is most beneficial to the insured. Berliner v. Travelers' Ins. Co., 121 Cal. 458, 461, 53 P. 918, 41 L.R.A. 467, 66 Am. St.Rep. 49. Where language, somewhat technical in character—or if not technical at least colored by the meaning attributed to it by medical men with which laymen are more or less unacquainted—is to be construed, it is far safer to leave the meaning thereof, with all the circumstances in mind, to the trier of fact, than for a reviewing court to lay down a hard and fast rule as to what the language means. Amok Gold Mining Co. v. Canton Ins. Office, 36 Cal.App. 265, 270, 171 P. 1098. Unless it is obvious that a word was used in its technical sense it will be given the meaning that common speech imports. Greenberg v. Continental Casualty Co., 24 Cal.App.2d 506, 510, 75 P.2d 644; Fitzpatrick v. Metropolitan Life Ins. Co., 15 Cal.App.2d 155, 158, 59 P.2d 199.

In discussing the distinction between patent and latent ambiguities and the admissibility of extrinsic evidence as an aid in the construction of a writing, the author of the subject in California Jurisprudence says that there is a third and intermediate class of cases where the words are all sensible and have a settled meaning, but at the same time consistently admit of two interpretations according to the subject matter in the contemplation of the parties. 10 Cal. Jur. 939, sec. 204. Jenny Lind Co. v. Bower & Co., 11 Cal. 194, cited in support of the text, says, page 198: "The language of every instrument should be so construed, if possible, as to effectuate the intentions of the parties; and to ascertain the meaning attached to particular words, when such words are used in various senses, parol evidence is perfectly legitimate." The court held that the word "north" was susceptible of more than one meaning and that parol evidence was admissible to show in what sense the parties used the word. See also Wachs v. Wachs, 11 Cal.2d 322, 79 P.2d 1085; Ferris v. Emmons, 214 Cal. 501, 6 P.2d 950; Pierson v. Bradfield, 43 Cal.App. 2d 519, 524, 111 P.2d 460; Norton v. Farmers Automobile Inter-Insurance Exchange, 40 Cal.App.2d 556, 105 P.2d 136.

[12] If "the language employed be fairly susceptible of either one of the two interpretations contended for, without doing violence to its usual and ordinary import, or some established rule of construction, then an ambiguity arises, which extrinsic evidence may be resorted to for the purpose of explaining. This is not allowing parol evidence for the purpose of varying or altering the contract, or of putting a different sense and construction upon its language from that which it would naturally bear, but for the purpose of showing the circumstances under which the language was used, and applying it according to the intention of the parties. 'The true interpretation of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception, or perhaps a corollary, to the general rule above stated, that when any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself.'" Balfour v. Fresno Canal & Irrigation Co., 109 Cal. 221, 225–226, 41 P. 876, 877. See also Union Oil Co. v. Union Sugar Co., 31 Cal.2d 300, 306, 307, 188 P.2d 470; Enos v. Armstrong, 75 Cal.App.2d 663, 668, 171 P.2d 137; Norton v. Farmers Automobile Inter-Insurance Exchange, 40 Cal.App.2d 556, 565, 105 P.2d 136.

Shain v. Mutual Benefit, Health & Accident Ass'n, 232 Iowa 1143, 7 N.W.2d 806, held that where a health and accident policy insured against loss of life, limb, sight or time resulting directly from accidental bodily injury and provided for specific losses, a subsequent provision for indemnity, as for illness for an accidental injury, fatal or otherwise, resulting in "hernia" or enumerated diseases, introduced an ambiguity into the contract which must be construed most favorably to the insured as extending coverage so as not to preclude recovery of death benefit for death resulting from "hernia" caused by an accidental fall.

Kane v. Order of United Commercial Travelers, 3 Wash. 2d 355, 100 P.2d 1036, held that an ambiguity existed in a contract of insurance which insured against accidental death but exempted the insurer from liability for losses caused by an "infection" and that the policy was open to two constructions as to the meaning of the word "infection", one being the meaning to members of the medical profession and the other being the meaning to the minds of laymen. The court held that where it did not clearly appear from the contract that the word was used in a medical sense, it would be presumed that the parties intended the word as it was ordinarily understood by the average person and that the parties did not intend to classify pneumonia as an "infection," although in a medical sense pneumonia is an "infection."

Stewart v. Guarantee Trust Life Ins. Co., 321 Ill.App. 588, 53 N.E.2d 476, 478, held that where a special income disability policy excluded arthritis and numerous other maladies from coverage, and where the policy did not distinguish between different kinds of arthritis, an ambiguity existed as to whether "post-operative arthritis" was excluded as well as "pre-existing arthritis." It was held that the policy was not intended to exclude "post-operative arthritis."

Provident Life & Acc. Ins. Co. v. Sims, Tex.Civ.App., 149 S.W.2d 281, held that where a policy provided for payment of $40 a month for not to exceed twelve consecutive months for total disability resulting from external, violent and accidental means, but limited coverage for "hernia" to fourteen days, there was a direct conflict between the general coverage and the special coverage which created an uncertainty and ambiguity. It was held that the general provision controlled and that the insured who suffered a "hernia" was entitled to $40 a month for the duration of disability not to exceed twelve months.

The evidence *dehors* the contract was this: An "esophageal hiatus diaphragmatic hernia" is of rare occurrence. The ratio of "inguinal hernias" to "esophageal hiatus diaphragmatic hernias" is about one thousand to one. An operation for the latter is an unusual type of surgery and there are few surgeons qualified to perform it. An operation for an "esophageal hiatus diaphragmatic hernia" is only performed by specialists. The operation on respondent involved removal of a rib, collapsing of a lung, and required about two hours to perform. An "esophageal hiatus diaphragmatic hernia" is not to be compared with an "inguinal hernia." A "hernia" ordinarily projects into another cavity. The "hernia" sustained by Pendell was a sliding "hernia." It did not go into another cavity. The diaphram was not ruptured. The medical profession has been diagnosing this type of "hernia" only since about 1920.

Further it may be reasonably inferred from the contract itself and from the parol evidence that the surgical fee provided in the contract for an operation for "hernia" did not embrace within its scope an operation for an "esophageal hiatus diaphragmatic hernia." As stated, the fee schedule read: "Hernia—Cutting operation for radical cure of Single hernia . . . 50.-00 More than one hernia . . . 75.00". "Radical cure" means surgical cure of the "hernia" in contrast to wearing a truss or other manipulated procedures. A double "hernia" is an indirect and direct "inguinal hernia" on the same side. A double "esophageal hiatus diaphragmatic hernia" is almost an impossibility. The fact that the surgical fee schedule specifies a "single hernia" implies a "hernia" of the inguinal type. A physician testified that the word "hernia" as used in the "Surgical Fees Rider" connotes the common "inguinal hernia."

[13] Appellant refers us to a number of definitions of "hernia" as used by lexicographers and in medical works. Webster's New International Dictionary, 2d Ed.; Funk and Wagnall's New Standard Dictionary; American Illustrated Medical Dictionary, 15th Ed. 554; Maloy, Legal Anatomy and Surgery, 571; Gray, Attorney's Textbook of Medicine, 2d Ed. 771. The definitions do not help appellant. As we have indicated, the word "hernia" is to be construed in its popular sense; it is to be taken as an average person, with usual and ordinary intelligence, would understand it, rather than in its technical or scientific sense as defined or used by lexicographers or persons skilled in the niceties of language. 44 C.J.S., Insurance, § 294, page 1156.

The 1927 Pennsylvania Workmen's Compensation Law provided that "[h]ernia shall be considered as a physical weakness or ailment. * * *" Act April 13, 1927, P.L. 186, 189. In Berner v. Philadelphia & Reading Coal & Iron Co., 100 Pa.Super. 324, 329, it was held that the legislature used "the term 'hernia' in a popular, rather than in a surgical, sense and as implying a noticeable protrusion from some part of the abdominal cavity * * *." In Pollock v. Clairton School Dist., 100 Pa. Super. 333, Pollock sustained a "strangulated intestinal hernia." Referring to the Berner case, the court stated, 100 Pa.Super. at page 338: "That was a case of ordinary inguinal hernia to which the amendment [1927 Law] clearly applied. In a surgical sense, hernia includes not only the protrusion of parts of the viscera from the abdominal cavity but also of any soft interior organ from its normal cavity, as a hernia of the brain, lung or eye, and of course includes an intestinal hernia of the type disclosed by the operation described in this case. But when the use by the legislature of the word 'hernia' is considered in the light of all the provisions of the amendment, we think it is clear that it did not intend to bring within the scope of the operation of the amendment any hernias other than the ordinary hernias, or 'ruptures,' which gives evidence of their occurrence by a protrusion from some part of the abdominal cavity. We are of opinion that the amendment was not intended by the legislature to apply to a hernia of the kind shown by the evidence in this case to have been accidentally suffered by claimant's husband in the course of his employment and to have been the direct cause of his death." Pastva v. Forge Coal Mining Co., 119 Pa.Super. 455, 179 A. 919, 921, where the plaintiff sustained an "intra-abdominal hernia," is to the same effect. See also Tenaro v. Keasby & Mattison Co., 151 Pa. Super. 598, 30 A.2d 626.

Royal Indemnity Co. v. Jones, Tex.Civ. App., 201 S.W.2d 129, held that a "hernia nuculeus pulposus" was not a "hernia" within the meaning of the Texas Workmen's Compensation Act, Vernon's Ann. Civ.St. art. 8306, § 12b, the court saying, page 132: "In Lewis v. American Surety Co., 143 Tex. 286, 184 S.W.2d 137, 139, the broad definition of hernia is set out, but the Court said: 'While the definition of hernia includes any and all protrusions of an internal organ from its natural location, it is evident that that term was used by the Legislature in its popular sense in the compensation statutes. Should an employee, for example, suffer an injury in the course of his employment producing a hernia of the brain, it is not believed that his right, or that of his beneficiaries, to recover compensation therefor should be limited and controlled by the specific provisions of the hernia statute. They cannot be made to apply practically to such an injury.'"

In Furferi v. Pennsylvania R. Co., 117 N.J.L. 508, 189 A. 126, 130, the court observed that a special provision in the New Jersey Compensation Act, N.J.S.A. 34:15-1 et seq., was in the nature of an exception, and, by the same token, was to be strictly construed, and that "A case not within its precise letter is to be excluded." Berry v. United Commercial Travelers of America, 172 Iowa 429, 154 N.W. 598, L.R.A.1916B, 617, Ann.Cas.1918A. 706, held that loss of time due to an operation to relieve a "hernia" caused by a fall was covered by a policy of insurance against loss of time on account of bodily injury effected through external, violent, and accidental means although the policy provided that the payments authorized did not cover loss resulting from or in consequence of "hernia." Vol. 1, Appleman on Insurance Law and Practice, p. 547, § 443, says that "the tendency of the courts has been to hold that where the policy excludes liability for injury or death resulting from hernia that if the hernia resulted directly from accidental means, the insurer would not be relieved of liability."

Respondent sustained an "esophageal hiatus diaphragmatic hernia" as a result of an accident. He was insured against the accident by the general provisions of the contract. Had he sustained a "hernia" not resulting from an accident, appellant might not have been liable. But when the "hernia" is the result of an accident it cannot be regarded as within the exclusion clause. A "hernia" may result from bodily disease or from trauma. Bige v. Industrial Acc. Comm., 105 Cal.App. 210, 287 P. 577; National Auto Insurance Co. v. Industrial Acc. Comm., 139 Cal.App. 414, 34 P.2d 163; Campbell, Workmen's Compensation, Vol. 1, p. 295, secs. 303, 305. The contract distinguished between accidental "bodily injury" and "bodily disease." It called "bodily disease" "such sickness" and said that "hernia" should be classified as "such sickness." The "hernia" sustained by respondent was the result of accidental "bodily injury" and not the result of "bodily disease." The object of respondent in making the contract was to secure compensation in case of nonoccupational accidental bodily injury. The contract insured against that hazard. That the contingency against which he insured did happen, resulting in bodily injury, is uncontradicted; that the bodily injury was received by accident, is conceded. The exclusion clause did not limit the indemnity under these facts. See Travelers' Ins. Co. v. Murray, 16 Colo. 296, 26 P. 774,

25 Am.St.Rep. 267; Atlanta Accident Ass'n v. Alexander, 104 Ga. 709, 30 S.E. 939, 42 L.R.A. 188; Thornton v. Travelers' Ins. Co., 116 Ga. 121, 42 S.E. 287, 94 Am. St.Rep. 99; Summers v. Fidelity Mut. Aid Ass'n, 84 Mo.App. 605; Annotations: 8 L.R.A.,N.S., 1014, L.R.A.1916B, 621.

[14, 15] We conclude that the word "hernia" as used in the policy is uncertain and ambiguous, that extrinsic evidence was properly considered to aid the court in construing the contract, and that the finding that the parties did not intend to include an "esophageal hiatus diaphragmatic hernia" within the meaning of the word "hernia" as used in the policy, is supported by the evidence.

Appellant assigns as error the admission in evidence, over its objection, of a specimen of a "Surgical Operation Fees Rider" to nonoccupational health and accident policies, issued by it in April, 1946 (after respondent's accident), upon payment by an insured of an additional premium, which rider lists, among other operations for which it would pay the actual expenses incurred therefor but not exceeding the amount set forth in the operation schedule, the following: "Hernia—repair of: Femoral...... 40.00 Inguinal...... 40.00 Ventral...... 40.00 Umbilical...... 40.00 Scrotal...... 40.00 Double Hernia...... 50.00". It will be observed that an "esophageal hiatus diaphragmatic hernia" is not listed. Respondent claims, as he did at the trial, that this specimen was properly admissible in evidence as an admission against interest indicating an intention on the part of appellant not to include an "esophageal hiatus diaphragmatic hernia" in the meaning of the word "hernia" as used in its 1943 contract.

[16-18] An admission is "A statement, oral or written, suggesting any inference as to any fact in issue, or relevant, or deemed to be relevant, to any such fact, made by or on behalf of any party to any proceeding." Smith v. Whittier, 95 Cal. 279, 296, 30 P. 529, 533. The declaration of a party to be admissible against him must tend to prove the fact in issue. Hall v. The Emily Banning, 33 Cal. 522, 524. It must be relevant to, and have a material bearing on, the issues in the case. 31 C.J.S., Evidence, § 276, page 1028; 20 Am.Jur. 461, sec. 545. It must concern the subject matter of the controversy. Pece v. Tama Trading Co., 22 Cal.App.2d 219, 223, 70 P.2d 652. A declaration which does not, under any reasonable construction, appear to admit or acknowledge the fact which is sought to be proved by it is not competent as an admission. 31 C.J.S., Evidence, § 277, page 1029.

[19, 20] We are of the opinion that admission of the 1946 rider in evidence was error. The only purpose served by that rider was to bind the company after April, 1946, to pay benefits upon the performance of specified operations for "hernia" in exchange for an additional premium to be paid by an insured desiring these additional benefits. It was another and different contract. It cannot be seriously contended that this evidence shows any admission, express or implied, that appellant did not intend to include an "esophageal hiatus diaphragmatic hernia" in the meaning of the word "hernia" as used in its 1943 contract. It is common knowledge that insurance companies issue a great variety of policies and riders and frequently change them from time to time and also from time to time offer additional benefits for additional premiums. Contracts "must be so interpreted as to give effect to the mutual intention of the parties *as it existed at the time of contracting.*" Civ.Code, sec. 1636. (Italics added.) The purpose of interpreting a writing is to ascertain the intention of the parties at the time the writing was made. The action taken by appellant in 1946 with respect to the amount it would pay for specified "hernia" operations has no bearing and does not shed any light on what was intended by the word "hernia" as used by it in its 1943 contract.

We do not think the error in admitting the 1946 specimen in evidence was prejudicial or resulted in a miscarriage of justice. Appellant did not introduce any evidence but rested on the contract. If the 1946 specimen helped respondent at all, which is doubtful, it was merely cumulative. The contract on its face, plus the evidence we have related, exclusive of the 1946 specimen, fully support the findings.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

95 Cal.App.2d 905

FLETCHER AVIATION CORPORATION v. LANDIS MFG. CO., Inc. et al.

Civ. 16993.

District Court of Appeal, Second District, Division 3, California.

Feb. 6, 1950.

The Fletcher Aviation Corporation sued the Landis Manufacturing Company, Inc., and another for conversion of certain patterns and dies and the value of a leasehold estate of which plaintiff was dispossessed by defendants.

From a judgment of the Superior Court of Los Angeles County, Stanley Mosk, J., for plaintiff, defendants appealed.

The District Court of Appeal, Wood, J., held that plaintiff, having lawfully acquired possession of the patterns and dies, was entitled to maintain the action, regardless of whether the United States had a superior interest in the property, that the value of the property at the time of the conversion with interest from such time was the proper measure of damages, and that evidence of the reproduction cost thereof was admissible.

Judgment affirmed.

1. Trover and conversion 🔑16

To maintain action for conversion, plaintiff need not be owner of property involved, if he had actual possession thereof at time of alleged conversion.

2. Trover and conversion 🔑23

A corporation lawfully acquiring possession of patterns and dies used by it in manufacturing airplanes under contract with United States, had sufficient interest therein to maintain action for wrongful conversion thereof, regardless of whether United States had superior interest; one having merely possession of property being owner thereof as against wrongdoer.

3. Trover and conversion 🔑49

The proper measure of damages for conversion of airplane manufacturer's patterns and dies, not shown to have become obsolete, was value thereof at time of conversion, with interest from such time. Civ.Code, § 3336.

4. Trover and conversion 🔑39

In action for conversion of patterns and dies used by plaintiff in manufacturing airplanes, evidence of reproduction cost of patterns and dies was admissible.

5. Appeal and error 🔑758(3)

In action for conversion of patterns and dies used by plaintiff in manufacturing airplanes, defendants' contention, on appeal from judgment for plaintiff, that trial court erred in sustaining objection to defendants' hypothetical question to witness as to value of dies on ground that question did not include all factors involved, cannot be sustained, where defendants' briefs do not point out evidence which they contend was sufficient basis for question and witness was permitted to testify that patterns and dies had only scrap value stated by him.

6. Evidence 🔑545

In airplane manufacturer's action for conversion of patterns and dies stored by plaintiff in factory building room sublet from airplane company, trial court did not err in refusing to permit such company's former supervisor of salvage to testify as to value of patterns and dies, in absence of showing that he was qualified to give opinion as to other than their salvage value, concerning which court stated that witness would be permitted to testify.

◆

Samuel J. Crawford and Joseph T. Enright, Santa Monica, for appellants.

Cosgrove, Clayton, Cramer & Diether, Leonard A. Diether, Frank D. MacDowell, Los Angeles, for respondent.

WOOD, Justice.

Action for damages for conversion of certain patterns and dies, and for the value of a leasehold estate of which plaintiff was dispossessed. Judgment was for plaintiff, and defendants appeal.

In 1941 the plaintiff was in the business of designing and manufacturing airplanes. In that year the plaintiff entered into a contract with the United States to manufacture airplanes, and proceeded with the performance of that contract until it was terminated by the United States in 1942. On November 1, 1943, the plaintiff, whose place of business was in Pasadena, subleased a room in a factory building from the Douglas Aircraft Company, in Santa Monica, for three years ending October 31, 1946. The room, which was known as the "drop-hammer room," was about 25 feet wide and 44 feet long. In this room plaintiff stored plaster patterns and metal dies which were used by it in manufacturing airplanes. Some time in 1946, prior to June 15th, defendant Ben Landis (who was president of the defendant corporation) purchased said building and the land upon which it was situated, subject to the above mentioned lease and sublease. Then he conveyed said premises to the defendant corporation which was engaged in the business of manufacturing popcorn vending machines and automobile accessories. The defendant corporation (hereinafter referred to as the defendant) then asked Douglas Aircraft Company for permission to occupy a part of the premises. Defendant Landis testified that a warehouseman of the Douglas Aircraft Company told him that the defendant could use the drop-hammer room if the defendant would clean it out. Thereafter, about June 15, 1946, the defendant, without the knowledge or consent of the plaintiff, entered the subleased room, removed the patterns and dies here involved, changed the lock on the door, and thereafter occupied the room until the termination of plaintiff's sublease. The defendants sold the metal dies to a junk dealer for $487, and hauled the plaster patterns to a "dump."

Appellants contend that plaintiff was not the owner and was not in lawful possession of the patterns and dies; and that the damages are excessive. There is no question on this appeal regarding the part of the judgment which provides that plaintiff recover $500, the value of the leasehold.

The amended complaint alleged that on June 15, 1946, "plaintiff was lawfully possessed of plaster patterns and drop-hammer dies for the fabrication and manufacture of a certain airplane designed and owned by plaintiff," all of which property was located on the premises (above referred to) and the area immediately adjacent thereto; that on or about said date defendants unlawfully took and carried away said personal property and "converted and disposed of the same to their own use, to the damage of plaintiff in the sum of $57,592.44." It was further alleged, as a second cause of action, that on June 15, 1946, plaintiff was the owner and in possession of the leasehold estate (therein described), which was of the value of $500; and that on said date defendants forcibly and against the will of plaintiff entered upon said premises and took possession thereof and converted the same to their own use, and dispossessed the plaintiff to its damage in the sum of $500.

The court found that on June 15, 1946, the plaintiff was "the owner of and in possession and entitled to possession of" certain patterns and dies which were of the value of $7,587; and that on said date plaintiff was the owner of, and in possession of, "a certain leasehold estate" upon an area known as the "drop-hammer room." Judgment was for $7,587, the value of the patterns and dies, and for $500, the value of the leasehold, making a total of $8,087; and for interest thereon from June 15, 1946.

[1, 2] Appellants (defendants) argue, in support of their contention that plaintiff was not the owner and was not in lawful possession of the patterns and dies, that said patterns and dies were acquired by plaintiff after it entered into a contract with the United States to manufacture airplanes; and that under the provisions of the agreement terminating that contract the United States became the owner of all

property acquired or produced by plaintiff in the performance of the contract. Plaintiff asserts that it is the owner of the patterns and dies, and that the contract specifically reserved in plaintiff the exclusive right to reproduce the airplanes, and the parts therefor, described in said contract. It also asserts that in any event it had sufficient interest in the patterns and dies to entitle it to maintain the action for conversion. In an action for conversion it is not necessary that plaintiff be the owner of the property involved, if the plaintiff had actual possession of the property at the time of the alleged conversion. Scott v. Bassett, 86 Cal.App.2d 373, 375, 194 P.2d 781; General Motors Acceptance Corp. v. Dallas, 198 Cal. 365, 370, 245 P. 184. It is not disputed that plaintiff had possession of the property at the time of the conversion, but appellants urge that it was not a lawful possession. Plaintiff acquired possession of the patterns and dies in a lawful manner. Defendants admittedly were wrongdoers. It is not necessary to determine herein, as between the plaintiff and the United States, whether the United States had a superior interest in said property. One "having the possession, merely, is the owner as against a wrong-doer." Rosenthal v. McMann, 93 Cal. 505, 508, 29 P. 121. In the case of Greenebaum v. Taylor, 102 Cal. 624, 36 P. 957, there was a question similar to the one here. In that action for conversion, the plaintiff had installed certain alleged "fixtures" in a building, which building was owned by a person who was not a party to the action. The defendant therein removed some of the "fixtures" and refused to return them to plaintiff. In that action the judgment in favor of the plaintiff was affirmed, and the court stated that the question whether (as between the owner of the building and the plaintiff) the plaintiff could have removed the fixtures was not before the court.

[3] Appellants' further contention that the damages are excessive is not sustainable. Appellants state in their opening brief that the patterns and dies "had a market value and that this value is the proper measure of the damages"; and they argue, in effect, that the patterns and dies had become useless and therefore the market value was the value as junk. In their closing brief appellants state that they do not contend that the measure of damages is the market value, but they contend "that the measure of damages is the value of the property plus interest to the 'owner,' or an amount to indemnify the owner specifically the United States Government." In any event, it appears that appellants' argument regarding the measure of damages is based upon the theory that the designs of the airplanes produced by plaintiff for the United States had become obsolete. Under the evidence herein it does not appear that the designs had become obsolete. During 1941 and 1942 plaintiff manufactured two kinds of military airplanes for the United States. Those were of the same basic design as a trainer airplane previously designed and made by plaintiff and known as FBT-2. Airplane parts which were made from the patterns and dies here involved were used in the manufacture of the three kinds of airplanes. In 1944 plaintiff designed a cargo airplane in the manufacture of which it used parts made from certain dies here involved. Although the records show that plaintiff manufactured office furniture and scooters for a period of time, it does not appear that plaintiff had abandoned the business of manufacturing airplanes. The court found that the FBT-2 airplane was a basic trainer airplane which continued to be suitable and usable as such. The evidence shows that plaintiff's name was on the "United States Air Force approved list" to submit bids for manufacturing airplanes; that in the fall of 1947 plaintiff received a request from the Army Air Force to submit a bid on trainer planes in the manufacture of which plaintiff could have used parts made from said patterns and dies; that plaintiff would have been able to submit a bid in compliance with that request if plaintiff had been in possession of said patterns and dies; that plaintiff kept informed as to the needs of the "Training Command" for airplanes, and that after manufacturing the above mentioned airplanes for the government, plaintiff's engineering department continued studies of its basic FBT-2 design with a

view to making airplanes for the "G. I." training program; and that at the time of the trial plaintiff was in receipt of a contract from the Army Air Corps.

Section 3336 of the Civil Code provides: "The detriment caused by the wrongful conversion of personal property is presumed to be: First—The value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted * * *." The court found that the patterns and dies "were on or about June 15, 1946, 10% depreciated, and on said date as so depreciated were of the value of" $7,587; and it concluded that plaintiff was entitled to interest thereon at the rate of 7% per annum from June 15, 1946. It appears therefore that the trial court awarded damages upon the basis of the first alternative of said code section above quoted, namely, "The value of the property at the time of the conversion, with the interest from that time." That was the proper measure of damages in this case. In the case of Lonergan v. Monroe, 77 Cal. App.2d 223, at page 225, 175 P.2d 42, at page 43, it was said: "The rule is that the value at the time and place of conversion is the measure of damages." It was also said therein, 77 Cal.App.2d at page 225, 175 P.2d at page 43: "The applicability of this rule is patent where, as here, the property was fabricated for a particular purpose."

[4-6] Appellants contend further that the court erred in certain rulings regarding the admissibility of evidence. They assert that the court should not have received evidence as to reproduction cost of the patterns and dies. That evidence was admissible. It was stated in Lonergan v. Monroe, supra, 77 Cal.App.2d at page 225, 175 P.2d at page 43: "[T]he cost of merchandise does not determine the amount of damages to be awarded in an action for its conversion. Such evidence is admissible not as showing the value conclusively but only as a circumstance to aid in arriving at the value at the time in question." They also assert that the court should not have sustained an objection to a hypothetical question, pertaining to the value of dies, which they asked their witness Nesbit. The trial judge was of the opinion that the question did not include all the factors involved. Appellants state that a hypothetical question may be based upon any theory which can be deduced from the evidence, but they do not point out in their briefs the evidence which they contend is a sufficient basis for the question. It appears, however, that the witness was permitted to testify that the patterns and dies had a scrap value only, and that the value was 6 or 7 cents a pound. They also assert that the court should have permitted their witness Bacon to give his opinion as to the value of the patterns and dies. The witness had been a "supervisor of salvage" at the Douglas Aircraft Company about five years, but it does not appear that the witness was qualified to give an opinion as to the value of the property other than its value as salvage. The court stated that the witness would be permitted to testify as to the salvage value. The contention regarding the admissibility of evidence is not sustainable.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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95 Cal.App.2d 890

SHEPHERD et al. v. GAMBLE et al.

Civ. 17013.

District Court of Appeal, Second District,
Division 2, California.
Feb. 6, 1950.

W. W. Shepherd and Norma B. Shepherd, copartners doing business as Shepherd Tractor & Equipment Company, sued L. Gamble and C. R. Gamble and caused a tractor to be attached as the property of defendants. Arden Crabbe, doing business as Redding Tractor & Equipment Company, filed a third-party claim.

The Superior Court, Los Angeles County, Frank G. Swain, J., adjudged third-party claimant to be the owner and entitled to possession of tractor, and plaintiffs appealed.

The District Court of Appeal, Moore, P. J., held that evidence justified judgment on ground that transfer was not fraudulent and void under statute as against creditors of defendants.

Judgment affirmed.

1. Fraudulent conveyances 🔑308(9)

Whether movable property after its sale has been delivered and its possession changed, so as to preclude transfer from being conclusively presumed to be fraudulent and void as to creditors of transferor, is a question of fact to be determined from all evidence. Civ.Code, § 3440.

2. Appeal and error 🔑1010(1)

A finding as to whether movable property after its sale has been delivered and its possession changed, so as to preclude transfer from being conclusively presumed to be void as to creditors of transferor under statute, is conclusive upon reviewing court unless it is clear from evidence and from inferences favorable to finding that determination is without substantial evidential support. Civ.Code, § 3440.

3. Fraudulent conveyances 🔑299(9)

Finding of a valid transfer of tractor from defendant to respondent, not fraudulent and void as to creditors of defendant under statute providing that transfer of personalty is conclusively presumed to be fraudulent and void as to creditors of transferor if made by transferor having possession and control, and if not accompanied by immediate delivery and followed by actual and continuous change of possession, was justified under evidence. Civ. Code, § 3440.

4. Fraudulent conveyances 🔑147(2)

Constructive delivery is not altogether forbidden by statute providing that transfers of personalty are conclusively presumed to be fraudulent and void as to creditors of transferor if made by transferor having possession and control, and if not accompanied by immediate delivery and followed by actual and continuous change of possession. Civ.Code, § 3440.

5. Appeal and error 🔑1170(7)

Refusal to strike portion of testimony of witness was harmless in view of prior testimony. Const. art. 6, § 4½.

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William K. Young, Los Angeles, for appellants.

Alfred E. Frazier, Red Bluff, for respondent.

MOORE, Presiding Judge.

The question for decision is whether the transfer of a huge tractor was void under section 3440 of the Civil Code by reason of the circumstances proved with respect to its delivery.

Defendant Gamble owned an 11½-ton tractor. At the time of his sale to respondent it was located on the Gier ranch 53 miles from Redding where respondent was in business. After the sale on July 8 defendant instructed Gier to release it to respondent. On July 15 appellants caused it to be attached at the Gier place as the property of defendant. Upon the issue raised by respondent's third party claim the court below adjudged claimant to be the owner and entitled to the possession of the machine. Appellants demand a reversal of the judgment on the ground that the transfer, as to them, was fraudulent in not having been accompanied by immediate delivery followed by an actual and continued change of possession.

Appellants contend (1) that respondent should have immediately removed the tractor with his own truck and trailer or have employed another available trucking firm 23 miles from the Gier ranch to transport the tractor to Redding; (2) that change of possession must be actual and not merely potential or theoretical.

[1, 2] Whether movable property after its sale has been delivered and its possession changed is a question of fact to be determined from all the evidence. The finding of such fact is conclusive upon the reviewing court unless it is clear from the evidence and from the inferences favorable to the finding that the determination derived by the trial court is without sub-

stantial evidential support. Hassell v. Bunge, 167 Cal. 365, 366, 139 P. 800; Porter v. Bucher, 98 Cal. 454, 459, 33 P.2d 335; Dubois v. Spinks, 114 Cal. 289, 293, 46 P. 95; Edgerton v. Scammon, 119 Cal. App. 273, 6 P.2d 295.

[3] Respondent's intention at the time of his purchase was to remove the tractor to his shop at Redding in order to dismantle it for its parts. His own truck and trailer were not immediately available to remove the tractor. To employ others would have entailed an expense, two to three times more than it would have been by using his own equipment. There were no adequate storage facilities in the Gier vicinity, a sparsely inhabited mill site. The vendor had departed for Los Angeles some 800 miles to the south promptly after receiving the sale price relying upon Gier to release the tractor to respondent. In view of such proof it cannot be said that the finding of a valid transfer by defendant to respondent was without substantial evidentiary support, but that such finding removed from the sale the presumed fraud of section 3440.

[4] The court below was not without support in deriving its conclusions. Constructive delivery is not altogether forbidden by section 3440. Where a movable is bulky and not readily transferable by manual delivery the rule of that section is relaxed by reason of the impracticability of actual delivery by ordinary means and methods. O'Connor v. O'Connor, Rice and Barnes, 44 Cal.App.2d 1, 5, 111 P.2d 656; Dubois v. Spinks, 114 Cal. 289, 293, 46 P. 95; Guthrie v. Carney, 19 Cal.App. 144, 151, 124 P. 1045.

The authorities cited by appellants are distinguishable on their facts. Della v. Home Bank, 105 Cal.App. 106, 286 P. 1064, involved a sale of cattle which could have been removed under their own power but remained in possession of the seller. In Grant v. Segawa, 44 Cal.App.2d Supp. 945, 112 P.2d 784, the property involved consisted of an automobile and small farming implements and it was transferred by its owner to his son under circumstances indicating fraud. In O'Connor v. O'Connor, Rice and Barnes, supra, the property transferred was maps and books readily removable but were kept and used by the transferor.

[5] Appellants assign as error the court's order denying appellants' motion to strike certain testimony of the witness Gamble with respect to the operating condition of the tractor. The witness had testified that "it had thrown a bearing out through the side of the case of the final drive and it was not in a movable condition." This was followed by "should have been overhauled before it was moved." Refusal to strike the last quoted clause was harmless. Constitution, Art. VI, sec. 4½. The testimony of the witness Gier had established that the tractor "should not have been moved at all" under its own power and the witness Gamble's testimony that "it was not in a movable condition" proved its impaired condition.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

95 Cal.App.2d 893

SHEPHERD et al. v. GAMBLE et al.

Civ. 16920.

District Court of Appeal, Second District, Division 2, California.

Feb. 6, 1950.

W. W. Shepherd and Norma B. Shepherd, copartners doing business as Shepherd Tractor & Equipment Company, sued L. Gamble and C. R. Gamble, and caused a truck transferred from defendants to Daniel J. McIlvana to be attached as the property of defendants. McIlvana filed a third-party claim.

The Superior Court of Los Angeles County, Ben Rosenthal, Judge of the Municipal Court of the City of Los Angeles, Los Angeles County, presiding as Judge under designation of the Chief Justice, as Chairman of the Judicial Council, rendered a judgment adverse to plaintiffs, and plaintiffs appealed.

The District Court of Appeal, Moore, P. J., held that evidence justified finding that the transfer of truck was not in fraud of creditors.

Judgment affirmed.

1. Fraudulent conveyances ⚿308(9)

Whether transfer of a truck from defendants to relative residing at and working out of same premises in same type of business was in fraud of creditors of defendants and void under statute providing that transfer of personalty is conclusively presumed to be fraudulent and void as to creditors of transferors if made by transferors having possession and control, and if not accompanied by immediate delivery and followed by actual and continuous change of possession, was for jury under evidence. Civ. Code, § 3440.

2. Appeal and error ⚿1010(1)

Determination that transfer was not fraudulent and void as to creditors of transferor under statute was conclusive on appeal where supported by substantial evidence. Civ. Code, § 3440.

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William K. Young, Los Angeles, for appellants.

A. James Ayers, Los Angeles, for respondent.

MOORE, Presiding Judge.

The question for decision is whether the finding that defendants' transfer of a truck to respondent was not in fraud of creditors was so arbitrary and unreasonable as to require a reversal of the judgment.

In July, 1947, defendants resided on Ellis Lane in Rosemead. One of them occupied the home at the front while the other lived there in a trailer. Soon respondent came and resided in the house at the rear. Defendants operated a landscape gardening business. Respondent followed generally the same pursuit and did hauling and general work. While thus circumstanced and engaged, defendants sold their equity in a used G.M.C. truck to respondent for $200 and he borrowed $400 to pay off the subsisting encumbrance then in default. Defendants had kept the truck at their home but immediately after the sale to respondent he took it to Burbank where he used it in hauling for two months. Thereafter he returned to Ellis Lane to reside on the premises of defendants who were his relatives and took over certain of their work they could not handle.

From April to August of 1948 respondent visited the state of Washington, but retained his place of residence at 1406 Ellis Lane. During his absence the truck remained at the latter address. Before his departure he arranged with Richard Gamble to use it at a specified rental "to help make the payments" to the finance company on respondent's contract. During the latter's absence on July 28, 1948, appellants caused a writ of attachment to be levied upon the truck as the property of defendants. Upon a trial of the controversy created by respondent's third party claim the court found him to be owner of the truck and adjudged him to be entitled to its possession. Appellants contend that the transfer of the truck by defendants was conclusively presumed to be fraudulent under section 3440 of the Civil Code and therefore void for the reason that there had been no actual and continued change of possession of the chattel.

[1, 2] Such conclusion might with propriety follow if the court had found from the evidence that there was no actual and continued change of possession. However, the proof was substantial that a year prior to the attachment respondent in good faith purchased the truck and thereafter used it exclusively for himself. That at times during his sojourn in the north he arranged for defendants to use it was a fact for the court's appraisal. That such arrangement did not derogate from the finding of a bona fide transfer was determined contrary to appellants' contention and cannot on appeal upset the general finding. Respondent caused the title of the truck to be registered in his own name; contracted for the financing of the $400 loan, and made all payments thereon except those maturing while he was absent from the state and they were

made with respondent's money. To hold that such a transaction as that found by the court is conclusively presumed to be fraudulent would virtually prohibit valid sales or exchanges of movables between parties residing at and working out of the same premises. The legislature could not reasonably have intended such iniquitous consequences. Since the problem is factual, its determination by the trial court is conclusive in the presence of substantial evidence. Hassell v. Bunge, 167 Cal. 365, 366, 139 P. 800.

The authorities cited by appellants, O'Connor v. O'Connor, 44 Cal.App.2d 1, 111 P.2d 656; Grant v. Segawa, 44 Cal.App.2d Supp. 945, 112 P.2d 784; Pfunder v. Goodwin, 83 Cal.App. 551, 257 P. 119, are distinguished by their facts. None of them lends support to appellant. See Shepherd v. Gamble, Cal.App., 214 P.2d 403.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

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96 Cal.App.2d 1

KRITZER v. LANCASTER et al.

Civ. 17338.

District Court of Appeal, Second District, Division 1, California.

Feb. 7, 1950.

Rehearing Denied March 6, 1950.

Hearing Denied March 30, 1950.

J. Haskel Kritzer sued Fred W. Lancaster, Bingham, Walter & Hurry, a limited partnership, for accounting of money turned over to defendants by plaintiff pursuant to an oral agreement between them.

A judgment of dismissal after plaintiff elected to stand on his complaint following sustaining of defendants' general and special demurrers with leave to amend was rendered by Superior Court of Los Angeles County, Stanley N. Barnes, J., and the plaintiff appealed.

The District Court of Appeal, Drapeau, J., held that complaint was sufficient to state a cause of action for accounting as against the general and special demurrers.

Judgment reversed with directions.

1. Pleading 🔑218(3)

Any matter inserted in order ruling on a demurrer other than the decision for or against the demurrer is surplusage and should not be regarded.

2. Account 🔑12

An action for an accounting is a matter of equity jurisdiction.

3. Account 🔑17(1)

Where complaint alleged a confidential relationship arising out of oral agreement by defendants to handle plaintiff's money and invest it in sound securities for his benefit, that defendants were guilty of misconduct in that they bought and sold speculative securities with plaintiff's money for their own gain and secret profit, and that such misconduct resulted in loss to plaintiff which could not be ascertained without an accounting, stated a cause of action in equity for an accounting as against a general demurrer.

4. Pleading 🔑367(1)

Objection to pleading as uncertain does not go to failure to allege sufficient facts, but to doubt as to what pleader means by facts alleged.

5. Account 🔑17(1)

Complaint in action for account need only state facts showing existence of relationship requiring accounting and that some balance is due plaintiff.

6. Pleading 🔑12

Pleader need not state facts peculiarly within his opponent's knowledge.

7. Pleading 🔑193(1, 6)

Complaint for accounting for transactions resulting from investing money of plaintiff was not subject to special demurrer either on ground that it contained several alleged causes of action without separately stating them or on ground that it was uncertain.

A. V. Falcone, Los Angeles, for appellant.

Adams, Duque, Davis & Hazeltine, Los Angeles, Charles E. Stimson, Jr., Los Angeles, of Counsel, for respondents.

DRAPEAU, Justice.

Plaintiff appeals from a judgment of dismissal made under the provisions of subdivision 3, section 581, Code of Civil Procedure.

Appellant elected to stand on his complaint following the sustaining of respondents' general and special demurrer with leave to amend, and after his motion to vacate said ruling and to rehear the demurrer had been denied.

The action is for an accounting of money turned over to respondents by appellant pursuant to an oral agreement between them.

The complaint stripped of much of its verbiage alleges that respondent partnership is a stockbroker and a member of the Los Angeles Stock Exchange; that respondent Lancaster is employed by said broker as a salesman of securities; that appellant and said Lancaster have been friends and confidants since 1930, and that appellant "reposed great confidence in said defendant's friendship, integrity and business judgment, particularly * * * with regard to safe investments in corporate securities; that all said facts were at all times herein alleged known to defendants Lancaster and Broker."

Further, that in February, 1945, when appellant was 60 years of age and in ill health, with only $30,000 left of substantial sums earned in the practice of his profession and other pursuits, much of which had been lost through unfortunate investments, the *parties made an oral agreement:* that appellant should have a qualified person to invest the $30,000 in such investments as could be readily converted into cash, so as to protect the principal and afford some return to appellant, but "never with the object of speculative gain." That respondents solicited appellant that they be the persons to attend to such investments for him; that because of appellant's great confidence in respondents and their experience in the investment field, he accepted their offer; that in order to carry out said plan, it was required that appellant open an account with Broker, so that respondents could invest his money in select corporate securities under their constant supervision and advice "giving plaintiff their expert knowledge and advice, paying cash for said securities, never dealing on margin or credit and acquiring said securities for plaintiff as the owner thereof outright, keeping all said securities segregated and ear-marked as plaintiff's property and keeping them with said defendants so that they could be readily available for dealing by them for plaintiff, said defendants to so invest plaintiff's money only in safe and proven securities in corporations and industries of which said defendants had complete personal knowledge and means of such knowledge regarding said corporations and industries and the economic soundness and value of said securities and always for plaintiff's best interests and to protect his principal."

That relying on said agreement and his confidence in respondents, appellant opened an account with broker in February, 1945; that thereafter until June, 1947, respondents bought and sold securities for appellant, who paid them various sums of money, as requested, and executed numerous powers of attorney, stock powers and other authority for the purchase and sale of said securities by respondents; that at all times, respondents had sufficient money and securities belonging to appellant to buy and sell for cash without necessity of credit or margin; that appellant never had an account with defendants on margin and never obtained from, nor requested that credit be extended to him.

That during the period in question, respondents continually stated and represented to appellant that they were buying and selling for him the best and safest securities; that they had personal knowledge of the economic soundness and value thereof and of the respective corporations and industries represented thereby; that they were continuously supervising and directing his account and their purchase and sale of securities for him; that he should and could rely upon their experience and knowledge and the fact that they were investing his money "only in such securities"; that appellant at all times believed said statements and representations and relied thereon, as respondents were well aware.

That said alleged statements and representations were false and known to respondents to be false when made; that they were made for the purpose and with the intention of deceiving appellant "into believing the same and to therefore rely thereon", so that he would continue to permit respondents to handle his money for their own profit and gain. That respondents made numerous transactions purportedly for the best interest of appellant in accordance with the aforesaid agreement, but in fact for their own gain and profit in that they knowingly bought and sold speculative and unsound securities with appellant's money, thereby making secret profits and other gains without informing appellant or accounting to him therefor.

That such conduct of respondents resulted directly in a decrease of appellant's capital and money and the use thereof and a loss in his said account, the total of which is unknown to him, but is known to respondents; that appellant alleges on information and belief that said total loss exceeds $10,000, and that the amount of secret profits made by respondents exceeds $2,000.

That in September, 1946, appellant's capital and money began to decrease as a direct result of respondents' alleged misconduct, and appellant from time to time inquired the reason for such decrease, whereupon respondents repeatedly stated to him that the situation was temporary and due to technical market conditions and not attributable to any unsafe or unsound condition of the securities involved; that he could rely upon their knowledge and experience "to protect his principal and that his money and account were under their constant supervision and direction and would not be jeopardized or permanently decreased in value; that plaintiff believed said statements and representations and relied thereon, which fact was at all times known to said defendants; that said statements were false and known by said defendants to be false when made by them and were made by them for the purpose and with the intention of inducing plaintiff to believe the same and to rely thereon and to therefore continue to permit said defendants to so deal with his money and account."

That about September 5, 1947, appellant obtained independent legal advice and for the first time ascertained that respondents had "bought and sold securities purportedly for him not only as his agents but as defendant Broker's own principal and together with other principals," and also for the first time learned that the securities so purchased and sold by respondents on his behalf were speculative and unsound and that the corporations and industries represented thereby were also unsound; that about October 3, 1947, appellant obtained his current securities from respondent broker and closed his account; that the market value of appellant's said securities at that time totaled approximately $15,000.

That thereupon appellant requested respondent broker to account to him in full for all transactions purportedly conducted for him and with his money; that on November 14, 1947, respondent broker furnished appellant with some incomplete information regarding his said account from which appellant for the first time learned that respondent broker made secret profits from its transactions with his money; that respondents have never fully accounted to appellant "for all their said acts and conduct relative to his said money and account."

The complaint then prays "for an accounting of all acts and conduct by defendants with plaintiff's money and account with defendant Broker and of all transactions conducted by defendants for plaintiff, either as his agent, defendant Broker's own principal or otherwise"; that the profits and gains made by respondents therefrom be determined, as well as appellant's losses and that judgment be rendered for such amount as the court may determine is due and payable to appellant.

Respondents interposed a general demurrer to the complaint and also demurred specially upon the following grounds:

1. That the complaint contains several alleged causes of action without separately stating them;

2. That the complaint is uncertain, ambiguous and unintelligible in twenty-six stated particulars.

It is here contended that the demurrer was erroneously sustained, it being urged that on an appeal from a judgment sustaining a demurrer the allegations of the complaint must be taken as true, Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 41, 172 P.2d 867; that pleadings should be read as a whole and must be liberally and reasonably interpreted, Hudson v. Craft, 33 Cal.2d 654, 661, 204 P.2d 1; and that a liberal construction of the complaint is required by section 452 of the Code of Civil Procedure, with a view to substantial justice between the parties.

Respondents on the other hand argue that the applicable rule in the instant case is stated in Metzenbaum v. Metzenbaum, 86 Cal.App.2d 750, 752-753, 195 P.2d 492, 493, to-wit: "Upon appeal from a judgment rendered after refusal to amend a complaint to which a demurrer has been sustained, it must be presumed that the pleader has stated his case as strongly as it can be stated in his favor and all ambiguities and uncertainties must be resolved against him."

In the case of Hudson v. Craft, 33 Cal.2d 654, 661, 204 P.2d 1, 5, cited by appellant, which was an appeal from a judgment of dismissal because of plaintiffs' failure to amend their complaint, after a demurrer thereto was sustained with leave to amend, the Supreme Court applied the rule of liberal construction and "are able to say that defendants were sufficiently apprized of the issues to be met. See Lord v. Garland, 27 Cal.2d 840, 168 P.2d 5."

[1] While appellant urges that it was understood by all parties that the judge who ruled on the demurrer would specify the grounds upon which it was sustained and thus simplify the matter of amending the complaint, the order made is general in its terms and does not indicate the grounds upon which the court acted.

As to this point, it is stated in 2 Cal.Jur. 811, sec. 477: "Furthermore, the code contemplates a general order alone. Any matter inserted in the order other than the decision for or against the demurrer is surplusage and not to be regarded. The question always is: Ought the demurrer to have been sustained?"

[2] It is a well-established rule that an action for an accounting is a matter of equity jurisdiction. Frequently a case presents a fiduciary relation between the parties in the nature of a trust which brings it especially within equitable remedies. (1 Cal.Jur. 168, sec. 28.)

[3] Moreover, where the allegations of the complaint "show that the defendant was the trusted agent of the plaintiff, acting in a fiduciary capacity, and having for a long period of time the entire charge and control of plaintiff's business, and that by various kinds of misconduct which are specially described, defendant caused losses and became liable in various sums of money, the true amounts of which cannot be ascertained and determined without an accounting, there is sufficient ground for an accounting in equity. Citing San Pedro Lumber Co. v. Reynolds, 111 Cal. 588, 44 P. 309; Brea v. McGlashan, 3 Cal.App.2d 454, 39 P.2d 877. (1 Cal.Jur. 178, Sec. 37.)

Analyzing the allegations of the complaint hereinabove briefly summarized, they aver (1) a confidential relationship; (2) an oral agreement pursuant to which respondents became the trusted agents of appellant to handle his money and invest the same in sound securities for his benefit; (3) misconduct of respondents who, contrary to the terms of the agreement, bought and sold speculative and unsound securities with appellant's money for their own gain and secret profit; (4) resulting loss to appellant which cannot be ascertained without an accounting, the means of which are within the knowledge of respondents.

These averments liberally construed sufficiently state a cause of action in equity for an accounting and are good as against a general demurrer.

[4-7] With respect to the special demurrer on the grounds that the complaint contains several causes of action which are not separately stated, and that it is uncer-

tain, ambiguous and unintelligible, while many of the allegations therein contained could be made much more definite and certain, it is rather clear that it states a cause of action for an accounting as it appears that a relationship exists which requires an accounting and that there is something due to appellant from the respondents.

Moreover, viewed in the light of the holding in Brea v. McGlashan, 3 Cal.App.2d 454, 459-460, 39 P.2d 877, 879, hereinafter quoted at length, we believe that appellant has stated his cause of action with sufficient particularity as to entitle him to a trial on the merits:

"Our system of pleading aims at certainty. Uncertainty is made a ground of demurrer. * * * The objection of uncertainty does not go to the failure to allege sufficient facts. It goes to the doubt as to what the pleader means by the facts alleged. (Citing authorities.) The first count of the complaint was, in reality, a cause of action for an accounting. Under our system of pleading, a cause of action for accounting need only state facts showing the existence of the relationship which requires an accounting and the statement that some balance is due the plaintiff. Whann v. Doell, 192 Cal. 680, 684, 221 P. 899. Ordinarily, no accounting is necessary between an employer and an employee. But where, as here, the payment is alleged to be in the form of a percentage of the moneys received by the employer, and the complaint alleged that the plaintiff did not know what moneys had been received through contracts procured by her, an accounting would be the only method of arriving at the amount due. See Arbuckle v. Clifford F. Reid, Inc., 118 Cal.App. 272, 275, 4 P.2d 978. A pleader is not required to state facts which are peculiarly within the knowledge of his opponent. Here, the complaint alleged sufficiently the employment, the manner of compensation, the performance of services showing *some* compensation to be due, and the fact that the correct amount could not be ascertained without an accounting. The additional allegation that the amount due was $8,000 was surplusage. Its inclusion did not make the complaint uncertain. Nor did it (as claimed by the defendant) render the count vulnerable, as stating two causes of action, without stating them separately. In San Pedro Lumber Co. v. Reynolds, 111 Cal. 588, 44 P. 309, 312, which was an action for an accounting against an agent, the complaint alleged various acts of misappropriation of moneys and property by the agent, and various acts of misconduct which resulted in losses to the principal, and prayed for an accounting to determine the exact liability. Overruling the contention that these allegations were uncertain, and that several causes of action were stated in one count, the court said:

" 'Such, then, being the nature of the action, and the facts averred warranting the institution of such an action, the points made by appellant that each averment of acts of misconduct by appellant constitutes a separate cause of action, which cannot be properly joined with either of the others, and that the complaint is uncertain, etc., because it does not state more particularly how each item of alleged liability arose, when it was created, and especially its amount, cannot be maintained. The purpose of the action was to call appellant to an accounting touching matters peculiarly within his knowledge, and arising out of the trust reposed in him; and we think that for this purpose the cause of action is stated with sufficient particularity. West v. Brewster, 1 Duer [647, 8 N.Y.Super.Ct.] 647; Green v. Brooks, 81 Cal. [328], 333, 22 P. 849; Rippe v. Stodgill, 61 Wis. 38, 20 N.W. 645; Colonial, etc., Mortgage Co. v. Hutchinson Mortgage Co., C.C., 44 F. 219. And the character of the complaint is not changed by the averment that before the commencement of the action an investigation had shown that the respondents had suffered a loss of "upwards of $65,000.' "

"We conclude that the demurrer upon the ground of uncertainty and misjoinder was properly overruled."

For the reasons stated, the judgment is reversed, with directions to the trial court to overrule the demurrer and allow respondents a reasonable time within which to answer the complaint if they be so advised.

WHITE, P. J., and DORAN, J., concur.

95 Cal.App.2d 835

HOLSINGER v. HOLSINGER.

Civ. 14124.

District Court of Appeal, First District, Division 2, California.
Feb. 2, 1950.

Action by Max Holsinger against Anne Holsinger for divorce.

The Superior Court in and for the City and County of San Francisco, Milton D. Sapiro, J., granted defendant's motion for order to relieve her from interlocutory decree of divorce entered on default, granted defendant permission to file an answer and cross-complaint, and plaintiff appealed.

The District Court of Appeal, Dooling, J., held that the general rule that, where a judgment has been entered after default of a party has been taken, six-month period in which an application to be relieved from judgment may be filed runs from date of default, and not from date of judgment, applied to divorce decrees.

Order reversed.

1. Judgment ⚷153(1)

Under statute providing that aggrieved party may apply to be relieved from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect within six months after judgment, order or proceeding was taken, six-month period runs from date of default and not from date of judgment. Code Civ.Proc. § 473.

2. Judgment ⚷113

A default judgment cuts off defendant from making any further objection to relief which plaintiff's complaint shows he is entitled to demand, and a defendant against whom a default is entered is out of court and is not entitled to take any further steps in cause affecting plaintiff's right of action.

3. Judgment ⚷113

A defendant against whom a default judgment has been entered cannot thereafter, until such default is set aside in a proper proceeding, file pleadings, move for a new trial, or demand a notice of subsequent proceedings.

4. Divorce ⚷160

Code provision that no divorce can be granted upon default of defendant does not give defendant in a divorce action any greater rights after his default than in any other action, but merely declares policy of law to be that, in divorce cases, whether defendant suffered default or not, relief shall not be granted until facts upon which it is sought are established by proof. Civ. Code, § 130.

5. Divorce ⚷161

Effect of a defendant's default in a divorce action is to foreclose defendant from right of contest as in other actions, so that default must be set aside to afford defendant any effective relief, and time to move for relief runs from date of default, and not from date of interlocutory decree. Code Civ.Proc. § 473; Civ.Code, § 130.

6. Divorce ⚷161

Application by defendant to be relieved from interlocutory divorce decree on grounds of mistake, inadvertence, surprise, and excusable neglect, filed more than six months after date of default, but within six months from date of interlocutory decree, was not timely. Code Civ.Proc. § 473; Civ.Code, § 130.

7. Divorce ⚷184(1)

Where motion to vacate interlocutory default divorce decree was not made on ground of extrinsic fraud, order granting the motion could not be sustained on such ground. Code Civ.Proc. § 473; Civ.Code, § 130.

Freed, Gebauer & Freed, San Francisco, for appellant.

Goldstein, Lewis & Barceloux, San Francisco, for respondent.

DOOLING, Justice.

Appellant sued respondent for divorce and summons was personally served on respondent on December 26, 1947. Respondent employed an attorney and with his advice entered into a property settlement agreement with appellant. Respondent failed to appear in the action and on January 13, 1948 her default was entered. The cause was brought on for hearing on that date as a default matter and after hearing the testimony of appellant and his corroborating witness the trial judge continued the matter and expressed a desire to hear the respondent. Counsel for appellant communicated with respondent and she wrote a letter to the judge advising him that she did not desire a divorce. Thereupon, on January 16, 1948, the judge dropped the cause from the trial calendar.

On July 28, 1948 the cause was brought to trial before a different judge and an interlocutory decree of divorce was entered on that day. On August 16, 1948 respondent noticed a motion for an order relieving her from the interlocutory decree on the grounds of "mistake, inadvertence, surprise and excusable neglect", and on October 15, 1948 an order was made vacating the interlocutory decree and the respondent's default and granting her permission to file an answer and cross-complaint. The appeal is taken from this order.

It will be observed that the motion was only directed to the interlocutory decree of divorce and not to the default previously entered on January 13, 1948, and that the court nevertheless ordered the default set aside as well as the decree. This is an irregularity the effect of which we need not consider because of a more serious defect in the proceedings which necessitates a reversal. Under section 473 Code of Civil Procedure an application to be relieved from a judgment, order or other proceeding taken against a party "through his mistake, inadvertence, surprise or excusable neglect" must be made within "six months, after such judgment, order or proceeding was taken".

[1] It is the general rule that where a judgment has been entered after the default of a party has been taken the six month period runs from the date of the default and not from the date of the judgment. Title Insurance & Trust Co. v. King, etc., Co., 162 Cal. 44, 120 P. 1066; McLain v. Llewellyn Iron Works, 56 Cal.App. 58, 204 P. 869; Scott v. Crosthwaite, 69 Cal.App.2d 660, 663, 159 P.2d 660; 14 Cal.Jur., Judgments, sec. 112, pp. 1068–1069. The reason for the rule is thus stated in Title Insurance & Trust Co. v. King, etc., Co., supra, 162 Cal. at page 46, 120 P. at page 1067:

[2, 3] "A default cuts off the defendant from making any further opposition or objection to the relief which plaintiff's complaint shows he is entitled to demand. A defendant against whom a default is entered 'is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action.' 6 Ency. of Pl. & Pr. 126. He cannot thereafter, nor until such default is set aside in a proper proceeding, file pleadings, or move for a new trial, or demand notice of subsequent proceedings. 6 Ency. of Pl. & Pr. 127."

As more tersely expressed in Christerson v. French, 180 Cal. 523, 525, 182 P. 27: "A defendant against whom a default is entered is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action. (Citing cases.)"

[4-6] It was the trial judge's theory that because of the language of section 130, Civil Code—"No divorce can be granted upon the default of the defendant * * *" —this general rule does not apply in divorce actions, and the time within which to apply for relief runs from the date of the interlocutory decree of divorce and not from the date of the default. The cases do not support this theory. The effect of sec. 130, Civ.Code is not to give the defendant in a divorce action any greater rights after his default than in any other action. "The provision of the Civil Code merely declares the policy of the law to be that in divorce cases, whether the defendant suffer default or not, the relief shall not be granted until the facts upon which it is sought are established by proof." Foley v. Foley, 120 Cal. 33, 37, 52 P. 122, 123, 65 Am.St.Rep. 147. But the proceeding, after defendant's default, is no longer an adversary proceeding in the sense that defendant has the right to plead or otherwise appear therein

in opposition to plaintiff. Foley v. Foley, supra; Reeves v. Reeves, 34 Cal.2d 355, 209 P.2d 937; Waldecker v. Waldecker, 178 Cal. 566, 174 P. 36. It would seem to follow that the effect of defendant's default in a divorce action is to foreclose defendant from the right of contest as in other actions; that the default must be set aside to afford defendant any effective relief; and that for that reason the time to move for relief runs from the date of the default and not from the date of the interlocutory decree. This was apparently the view of the supreme court in Bowman v. Bowman, 29 Cal.2d 808, at page 813, 178 P.2d 751, 754, 170 A.L.R. 246, the court saying: "The trial court could not relieve defendant from the entry of the default because the motion under section 473 was not made within six months after the entry of default."

Loose language appears in some cases, Macbeth v. Macbeth, 219 Cal. 47, 25 P.2d 11; Chiarodit v. Chiarodit, 218 Cal. 147, 21 P.2d 562; Reeh v. Reeh, 69 Cal.App.2d 200, 158 P.2d 751, which lends some color to respondent's argument that in divorce actions the six month period to move under sec. 473 runs from the date of the interlocutory decree and not from the date of the default. The courts in those cases were not directing their attention to this question and the language there used must be regarded as dictum not controlling on this court.

[7] Whether respondent might have the default and interlocutory decree set aside on the ground of extrinsic fraud is not properly before us and on that question we express no opinion. The motion was not made on that ground, the order recites the grounds of the motion and makes no reference to fraud, and the order cannot be affirmed on a ground not stated in the motion nor considered by the court. Westphal v. Westphal, 61 Cal.App.2d 544 and cases cited at page 550, 143 P.2d 405.

The order appealed from is reversed.

NOURSE P. J., and GOODELL, J., concur.

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96 Cal.App.2d 74

PEOPLE v. WATKINS.

Cr. 2633.

District Court of Appeal, First District, Division 1, California.
Feb. 15, 1950.

Charles E. Watkins was convicted in the Superior Court in and for the City and County of San Francisco, Edward P. Murphy, J., of transporting marihuana and he appealed.

The District Court of Appeal, Per Curiam, adopted the opinion written and signed by Ward, J., prior to his death and held that the evidence sustained conviction.

Judgment affirmed.

1. Criminal law ⟹407(1)

In prosecution for transporting marihuana where objection was interposed that a conversation between arresting officer and a third person was out of the "earshot" of the defendants and was hearsay, objection was removed by repetition of the statement of the third party by the officer to each defendant.

2. Poisons ⟹4

In prosecution for transporting marihuana, possession while a circumstance tending to prove transportation is not an essential element of the specific offense though knowledge is an essential element, but knowledge of the exact character of the object or a specific intent to violate the law is not essential to prove transportation. Health and Safety Code, §§ 11012, 11500.

3. Poisons ⟹9

Evidence that defendant had knowledge of the presence of marihuana in an automobile which he was driving and intended to exercise control over it in view of his actions to avoid police detection sustained conviction for transporting marihuana. Health and Safety Code, § 11500.

4. Criminal law ⟹1134(8)

An alleged misquotation of the evidence in discussing the merits on a motion for a new trial by trial court did not require a reversal where the statement was of no consequence and the appeal was from the judgment and not from the denial of the motion for a new trial.

J. Maxwell Peyser, San Francisco, for appellant.

Fred N. Howser, Attorney General, David K. Lener, Deputy Attorney General, Edmund G. Brown, District Attorney of City and County of San Francisco, Francis Mayer, Assistant District Attorney, San Francisco, for respondent.

PER CURIAM.

Defendant Charles E. Watkins was charged jointly with Troy Carson with a violation of section 11500 of the Health and Safety Code, Deering's Health & Safety Code, 1949 Supp., alleged to have been committed by the transporting of marihuana. Carson entered a plea of guilty and was sentenced to imprisonment in the county jail for one year. Watkins was tried without a jury, convicted and also sentenced to one year imprisonment in the county jail.

On this appeal defendant attacks the sufficiency of the evidence to support the judgment. Two other points—(a) that the burden of proof as to the defendant's guilt was upon the People and (b) that a motion for a dismissal made at the close of the prosecution's case should have been granted, based solely upon the sufficiency of the evidence,—may be considered under the first point presented.

Two plain clothes officers, Casciani and Duveneck, of the San Francisco Police Department were driving a car, not marked as a police car, eastward on Folsom Street in San Francisco about 12:30 a.m. on April 22, 1949, when a tan Lincoln sedan driven by defendant Watkins passed, traveling in the same direction. In passing, the passenger in the sedan, Troy Carson, was observed looking into the police automobile. Watkins made a right turn at the next intersection into Ninth Street and picked up speed. The police car followed and as the car driven by Watkins continued to increase its speed the police officers turned on the red light and siren. Carson was observed leaning toward Watkins, the motor "raced considerably," Watkins leaned toward Carson, then Carson "went back against the door" and an object was thrown from the right window of the automobile. The automobile stopped at the next corner, Ninth and Harrison Streets. Watkins and Carson got out of the car in which they had been riding and on being questioned by the officers denied that anything had been thrown from the automobile. One of the officers walked back and picked up a paper bag which, as stipulated during the trial, contained marihuana. A stranger, Charles Johnson approached the group and talked to Casciani, out of earshot of Watkins and Carson. Officer Casciani's testimony in this connection was as follows:

"The Court: Both Troy Carson and this defendant denied throwing the bag out of the window of the car, is that correct, Officer? A. Yes, they denied that, Your Honor. * * * So while we were conversing with the two defendants another man approached by the name of Charles Johnson and I went up and talked to him, which was out of conversation earshot of the two defendants.

"Q. When you returned what happened? A. When I returned I said to Officer Duveneck, 'This fellow here says that there may be a second bag because the one he saw go out of the car went a little farther up the street.' So Bill [Duveneck] said, 'I'll go look for it.' * * * And when I said that to Officer Duveneck he started off to look for the bag and Troy Carson said, 'It's no use looking for the other bag,—there was only one,' and the defendant Watkins leaned over against Carson—they were both sitting in the rear seat of our automobile—and he clenched his fist and started swinging at him and said, 'What did you have to say that for?' So we had to hold them apart. And then I had a conversation with Carson.

"Q. In the presence of the defendant? A. Yes, and Carson said he bought the marihuana at Ellis and Fillmore and said he paid $12.50 for the bag and then he went across the street and bought a packet of brown cigarette papers, and then he met the defendant Watkins; and Watkins said that he had no knowledge that Carson had any paper bag or any marihuana.

"The defendant testified that he met Carson, a stranger, at Geary and Fillmore Streets while on his way to the lower part of Washington Street, but that he agreed to give Carson a ride to Third Street. When arrested, Watkins was not driving toward Third Street nor in the direction of Washington Street.

[1] On the trial an objection was interposed that the conversation between Officer Casciani and Charles Johnson out of the "earshot" of the defendants was hearsay; but the repetition of Johnson's statement by Casciani to each defendant was proper so far as a hearsay objection was concerned.

[2] The authorities cited by defendant on other points might be applicable if the accused were charged merely with possession of a narcotic, but the information specifically alleges that the defendants "did *transport* a quantity of MARIHUANA." (Emphasis added). Possession may be a circumstance tending to prove transportation but it is not an essential element to that specific offense any more than to an "offer to transport" or an "attempt to transport" a narcotic. Health & Safety Code, § 11500. To transport means to carry or convey and, under certain circumstances, to conceal. § 11012. However, in transportation, as in possession, there must be a knowledge of the presence of the object with intent to exercise, individually or jointly, control over it. Knowledge is an "essential element of the offense," but knowledge of the exact character of the object or of a specific intent to violate the law is not essential to prove transportation. People v. Gory, 28 Cal.2d 450, 170 P.2d 433; People v. Mandell, 90 Cal.App.2d 93, 202 P.2d 348.

[3] That defendant Watkins had knowledge of the presence of the object with intent to exercise control over its transportation may be inferred from the following chain of facts: driving his car in the opposite direction from the location designated by him to the police officers as his destination; accelerating the speed of his car when the police officers brought their red light and siren into play; and the leaning of Carson toward defendant just before the object was thrown from the window of the automobile. Furthermore, Watkins evidently was enraged at Carson and attempted to attack him when the latter admitted to the officers that there was at least "one [bag]." From the evidence the trial court had a right to draw inferences of guilt and to conclude that Watkins had an interest in the contents of the bag.

[4] The last point urged by defendant herein is that the motion for a new trial should have been granted in view of the fact that the trial court, in discussing the merits of the case on the motion for new trial, erred in stating a quotation from the evidence. The misstatement was of no consequence, but in any event must be disregarded on this appeal, as the appeal specifically is from the judgment and not from the denial of the motion for new trial. 8 Cal.Jur., pp. 560-561, § 561.

The judgment is affirmed.

The foregoing opinion was written and signed by Mr. Justice WARD prior to his death. We adopt it as the opinion of this Court.

PETERS, P. J., and BRAY, J., concur.

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96 Cal.App.2d 82

MOBERLY v. SMITH et al.

Civ. 17251.

District Court of Appeal, Second District,
Division 2, California.
Feb. 15, 1950.

Action by Mary P. Moberly, an incompetent, by the guardian of her estate, Bank of America National Trust & Savings Association, a corporation, against Alfred Smith and Emily Smith to recover damages for money allegedly obtained from plaintiff's incompetent under undue influence.

The Superior Court, Los Angeles County, Benjamin J. Scheinman, J., entered a judgment of nonsuit and the plaintiff appealed.

The District Court of Appeal, McComb, J., held that there was a total absence of material evidence on any of the essential allegations of plaintiff's complaint as amended showing a confidential relationship between Mrs. Moberly and the defendants or either of them, or that defendants or either of them had gained control of Mrs. Moberly or that she was incompetent at the time of the transactions questioned.

Judgment affirmed.

Insane persons 🔑99

In action to recover damages for money obtained from plaintiff's incompetent under undue influence, where there was a total absence of material evidence on any of the essential allegations of plaintiff's complaint as amended to the effect that a confidential relationship existed between plaintiff's incompetent and the defendants or that defendants gained control of plaintiff's incompetent or that plaintiff's incompetent was incompetent at the time of the transactions questioned, trial court properly granted motion for nonsuit.

Mason & Howard, Los Angeles, by C. Loy Mason, Los Angeles, for appellant.

David Silverton, Los Angeles, for respondents.

McCOMB, Justice.

From a judgment of nonsuit entered against her in an action to recover damages for money obtained under undue influence, plaintiff appeals.

Facts: Defendant Emily Smith was an ordained spiritualist minister from Detroit. Plaintiff's incompetent, Mrs. Moberly, was referred to in the evidence as the mother of Mrs. Smith. A number of transactions relative to the real property of Mrs. Moberly were entered into with Mrs. Smith and others. After Mrs. Moberly was declared incompetent, her guardian filed the present suit for the purpose of recovering from defendants the value of the property conveyed by Mrs. Moberly to them. At the trial, in addition to the facts hereinbefore set forth, numerous witnesses testified that Mrs. Moberly was a shrewd business woman and competent; that she knew what she was doing at the time of the transactions she had entered into. Defendants' motion for a nonsuit on the ground of the insufficiency of proof was granted by the trial judge.

Question: Was there a total absence of material evidence on any essential allegations of plaintiff's complaint as amended?

This question must be answered in the affirmative. There was a total absence of any evidence that (a) a confidential relationship existed between Mrs. Moberly and the defendants or either of them; (b) defendants or either of them had gained control of Mrs. Moberly; or (c) Mrs. Moberly was incompetent at the time of the transactions which are questioned. Therefore there was a total failure of proof upon the part of plaintiff as to material allegations of their complaint as amended, and the trial court properly granted the motion for a nonsuit.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

96 Cal.App.2d 78

PARKER v. OWEN.

Civ. 17294.

District Court of Appeal, Second District, Division 1, California.

Feb. 15, 1950.

Partition action by Gladys L. Parker against Margaret M. Owen.

The Superior Court of Los Angeles County, Thurmond Clarke, J., confirmed sale of realty, and plaintiff appealed.

The District Court of Appeal, Drapeau, J., held that where a sale was ordered in a partition action and it was to mutual advantage of both parties to get highest price available, trial judge in exercise of his sound discretion could accept higher bid offered in writing at hearing for confirmation.

Judgment confirming sale of parcel to highest bidder in open court affirmed.

1. Statutes ⚷223.5(4)

Where no cases were disclosed construing section of statute relating to procedure to be followed in judicial sales on partition, court would examine judicial interpretations of section of Probate Code which was similarly worded, to determine legislative intent. Code Civ.Proc. § 784; Probate Code, § 785.

2. Partition ⚷106

The statute relating to judicial sales in partition proceedings which did not impose conditions of unfairness and inadequacy of price on trial court, before court could accept in its discretion a written offer of 10 per cent more in amount than that named in return, by a responsible person, was clear and unambiguous, and would be read and interpreted exactly as it was written. Code Civ.Proc. § 784.

3. Partition ⚷106

Where sale was ordered in partition action, and it was to mutual advantage of both parties to get highest price available in the market, trial judge in exercise of his sound discretion could accept higher bid offered in writing at hearing for confirmation. Code Civ.Proc. § 784.

◆

Joseph N. Owen, Los Angeles, for appellant.

No appearance for respondent.

DRAPEAU, Justice.

By the instant action, plaintiff Gladys L. Parker sought to partition nine pieces of real property and two bank accounts between herself and her sister, defendant Margaret M. Owen, all of which property had been originally owned by their mother. During pendency of the cause, both the mother and the plaintiff died, but the action was continued in the name of the latter.

At the trial the court found that the action had been dismissed as to five parcels of real estate and that the parties each owned an undivided one-half interest in the two bank accounts and in the remaining four parcels; and that the latter could not be partitioned without great prejudice to the owners. Pursuant to its findings and conclusions, the court granted an interlocutory judgment of partition by which it appointed referees and ordered them to sell the four parcels of realty and after payment of costs and attorneys fees, to divide the balance between the two sisters, who were granted permission to bid at such sale.

For brevity, the realty here involved will be referred to as parcels 1: Hermosa, 2: Normandie, 3: Oxford and 4: Vermont.

Thereafter the sale was duly made and the referees submitted their report that parcels 1, 2 and 3 were sold to defendant Owen for $8,750, $10,250 and $18,250, respectively; and that parcel 4 was sold to Wm. R. Parker, individually and as trustee for Donald L. Parker, distributees by order of partial distribution in Estate of Gladys L. Parker, deceased, for $35,000; that these were the highest and best bids tendered and that the property was sold subject to confirmation of the court.

When said report of referees and petition for confirmation of sale came on for hearing, the court asked for further bids in open court, whereupon over the objection of defendant Owen, written offers increasing the sale bids by ten percent were made as follows:

Parcel 1: Hermosa, an increase of $875, or a total bid of $9,625 by Wm. R. Parker, as President of Parker Construction Company, a California corporation;

Parcel 2: Normandie, an increase of $1,025, or a total bid of $11,275 by Wm. R. Parker individually and Wm. R. Parker as trustee for Donald L. Parker, as successors in interest of plaintiff Gladys L. Parker, under order of partial distribution in her estate. There being no further or higher offers made, the court confirmed the sales of parcels 1 and 2 at the increased bids in open court, and also confirmed the sales of parcels 3 and 4 as made at the referees' sale.

This appeal is taken by defendant Owen from that portion of the order which confirmed the sales of parcels 1 and 2 to the Parkers on the increased bid in open court.

It is here contended that a mere raise in price at the time of confirmation, coupled with nothing else warranting legal or equitable interference, does not justify a court in refusing to confirm a sale made by its referees.

The point requires the construction of the language of section 784 of the Code of Civil Procedure which outlines the procedure to be followed in judicial sales of this character, i. e., the filing of a detailed report of the sale by the referees in the office of the County Clerk, after which upon notice any purchaser may move the court to confirm or set aside any sale so reported. "Upon hearing, the court must examine the return and report and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appears that a sum exceeding such bid at least ten per cent, exclusive of a new sale may be obtained, the court may vacate the sale and direct another to be had, of which notice must be given, and the sale conducted in all respects as if no previous sale had taken place. If an offer of ten per cent more in amount than that named in the return be made to the court, in writing, by a responsible person, it is in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale."

Appellant urges that read together, the last two sentences of said section, hereinabove quoted, may be fairly interpreted to mean that when it appears that the "proceedings were unfair," *or* "the sum bid disproportionate to the value," *and* "that a sum exceeding such bid at least 10% * * * may be obtained," the court in its discretion may either "vacate the sale and direct another to be had," or accept an offer (exceeding by 10% the amount named in the return) made in open court by a responsible person in writing. In other words, that either some unfairness in the sale or inadequacy of price must be present to justify the acceptance of a new bid at the time of confirmation.

[1] Appellant cites no case and research discloses none in which the construction of this section has been ruled on by an appellate court of this state. However, judicial interpretations of the meaning of section 785 of the Probate Code, which is similarly worded, are particularly persuasive. For instance, in Estate of Bradley, 168 Cal. 655, 660, 144 P. 136, 138, it was "argued that the requirement of unfairness or disproportion must also be met to authorize the court to accept an increased offer of 10 per cent. under the final sentence of section 1552 [of the Code of Civil Procedure, now section 785 of the Probate Code]. It is there provided that: 'If an offer of ten per cent more in amount than that named in the return be made to the court, in writing, by a responsible person, it is in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale.' But no such condition is stated in this part of the statute, and we see no sufficient reason for reading it in. That the increased offer, to the amount stated, is all that is needed to justify the court in confirming the sale to the higher bidder or ordering a new sale was clearly intimated in Griffin v. Warner, 48 Cal. 383, where the court was considering a section of the Practice Act, substantially similar to section 1552 of the Code of Civil Procedure * * *."

It should here be noted that the sentence construed in the cited case is worded almost exactly the same as the last sentence of section 784 of the Code of Civil Procedure now being considered.

The last sentence of section 785 of the Probate Code now reads: "But if a written offer of 10 percent more on the first ten thousand dollars ($10,000) bid and 5 percent more on the amount of the bid in excess of ten thousand dollars ($10,000) is made to the court by a responsible person, and the offer complies with all provisions of the law, it is in the discretion of the court to accept such offer and confirm the sale to such person or to order a new sale."

In discussing this section in Estate of Naftzger, 24 Cal.2d 595, 597, 599-600, 150 P.2d 873, 874, the Supreme Court stated:

"Appellants contend, in effect, that the last sentence of the quoted section must be understood as merely providing an alternative procedure for a factual situation already governed by the preceding sentence and not as authorizing a special procedure peculiar to a *different or excepted* situation. (Emphasis included.) * * *

"We are of the opinion, however, that the section under consideration should be read and interpreted exactly as it is written. * * *

"We are of the view that the probate court should be permitted 'the exercise of a wise discretion' (see Estate of Griffith, 1900, 127 Cal. 543, 544, 59 P. 988; see, also, Gossman v. Gossman, 1942, 52 Cal.App.2d 184, 194-195, 126 P.2d 178, in determining whether to confirm a sale on a bid made in open court of barely 10 per cent more in amount than that named in the return, or to order a new sale. We perceive no sufficient reason for reading into the second sentence of section 785 the requirement that to 'ten per cent more in amount than that named in the return'—which amount 'named in the return' in the contemplation of the statute may be subject to the payment of commissions and other expenses—there be added some assumed amount equal to the expenses of 'a new sale' which is not to take place or an amount equal to an expense which may be incident on confirmation of the sale in the original proceedings to the new bidder. (See Estate of Bradley, 1914, 168 Cal. 655, 660, 144 P. 136.) The statute itself does not specify such requirement; we shall not add it."

[2] The section under review is clear and unambiguous and "should be read and interpreted exactly as it is written." Estate of Naftzger, supra. There is nothing in the language of the section which would indicate an intention to impose upon the procedure outlined in its last sentence the conditions of unfairness and inadequacy of price recited in the foregoing sentence.

[3] Moreover, when a sale is ordered in a partition action, it is to the mutual advantage of both parties to get the highest price available in the market, and it is within the sound discretion of the trial judge to accept a higher bid when offered at the hearing for confirmation.

For the reasons stated, that portion of the judgment appealed from confirming sale of parcels 1 and 2 to the highest bidder in open court is affirmed.

WHITE, P. J., and DORAN, J., concur.

95 Cal.App.2d 885

In re LEFRANC'S ESTATE.

MASSON v. URBANI et al.

No. 14179.

District Court of Appeal, First District,
Division 1, California.
Feb. 6, 1950.

As Corrected Feb. 14, 1950.

Proceeding in the matter of the estate of Marie Lefranc, deceased, wherein Adele Masson, contestant, contested a will of the deceased, on ground that the deceased was not of sound mind when she executed the will. Edith C. Urbani and others were proponents.

The Superior Court in and for the County of Santa Clara, John D. Foley, J., rendered a judgment for the proponents and denied contestant's order for a new trial, and the contestant appealed.

The District Court of Appeal, Bray, J., held that denial of contestant's motion for continuance was not error, or, if error, was not prejudicial error, and that there was no error in admission and exclusion of evidence.

Judgment affirmed.

1. Wills 🔑394

Order denying new trial in will contest was not appealable. Code Civ.Proc. § 963; Probate Code, § 1240.

2. Wills 🔑319

Where no affidavit in support of motion by contestant for continuance of will contest because of absence of witness was offered, case had been pending over six years, contestant had previously rested her case, presentation of evidence by respondents was practically completed, and in request for continuance counsel did not set forth with definiteness what witness would have testified, denial of continuance was not error.

3. Wills ⚷400

Alleged error in denial of contestant's motion for continuance of will contest because of absence of witness was not reversible error where absent witness' affidavit offered on motion for new trial showed that her testimony would have been either of no value, or actually adverse to contestant.

4. Appeal and error ⚷966(1), 970(3, 4)
Continuance ⚷7
Trial ⚷59(2), 66

Motions for continuance, permission to reopen a case, and for calling witnesses out of order are largely in discretion of trial court, and it must clearly appear that such discretion has been abused before District Court of Appeal can reverse the trial court's action.

5. Wills ⚷53(2)

In will contest, on ground that testatrix was of unsound mind when she executed will in 1940, court properly refused to permit contestant to testify as to family relationships existing in 1907 for purpose of determining testatrix' state of mind in 1940.

6. Wills ⚷322

Where court in will contest stated that objection to certain testimony of contestant would be sustained "at this time", contestant had duty later to present the testimony to the court for a final ruling, and, where contestant did not do so, she could not complain on appeal of the preliminary ruling.

7. Evidence ⚷474(4)

In will contest, court properly permitted testatrix' chauffeur to be asked what his opinion was regarding the mental condition of testatrix at time when she signed will.

8. Evidence ⚷472(8)

In a will contest, a witness should not be asked whether in his opinion testatrix had testamentary capacity, since that is a question for the jury to determine.

9. Wills ⚷322

Alleged fact that court improperly sustained objections in will contest to questions asked by contestant of her witnesses would not make improper a similar question asked by proponents of their witness, where the question was proper on all legal grounds.

◆

Joseph A. Brown, San Francisco, for appellant.

Rea, Jacka & Frasse, San Jose, for respondents Edith C. Urbani and Wm. H. Pabst, executors of the Last will and testament of Marie Lefranc, deceased.

Burnett & Burnett San Jose, for respondents Nelty Lefranc Horney and Odus C. Horney, as guardian of the persons and estates of Suzanne Horney and Barrett Lefranc Horney, minors.

BRAY, Justice.

[1] In a contest of a will upon the ground of testatrix's unsoundness of mind, the jury found her to be of sound mind when she executed her will. Contestant appealed from the judgment entered thereon, and attempted to appeal from the order denying a new trial, which is not appealable. Code Civ.Proc., § 963; Probate Code, § 1240.

Questions Presented.

1. Alleged error of court in denying continuance. 2. Alleged errors in admission and exclusion of evidence.

Facts.

No question is raised as to the sufficiency of the evidence to support the verdict. Contestant, a niece of decedent, states in her opening brief (p. 2): "There was a conflict in the evidence to the extent that a verdict either way finds support in the evidence." In view of that fact, and the fact, as will hereafter be shown, that we find no error as charged, it is not necessary to discuss the evidence. (It might be added, parenthetically, that respondents contend that there is no evidence which would have supported a verdict other than the one rendered.)

1. Denial of Continuance.

[2] At the end of respondents' case and at the opening of the afternoon session, contestant moved for a continuance until the next morning for the "purpose of locating and producing a material witness, to-wit: Kathryn F. C. McGuire. I expect the witness to testify as a rebuttal witness, as to facts occurring between September '39, to February 1940, particularly in January of 1940, and I expect her to testify as to her opinion as to the soundness of mind of Marie Lefranc upon January 20th, 1940. The motion is based on those grounds, and on the further ground that contestant has used reasonable diligence in the effort to locate and produce said witness." Objection was made on the ground that it was not rebuttal testimony, but testimony in chief, and that it would require the recalling of witnesses who had already testified; on the further ground that the statement of contestant's counsel showed that he knew of this witness before he rested his main case; that no subpoena was out for her and that there was no assurance that the witness would be produced the next day. The court denied the motion. Under the showing here the court did not err in denying the continuance. No affidavit in support of the motion for continuance was offered, the case had been pending over six years, the contestant had previously rested her case, the presentation of evidence by respondents was practically completed, and in his request for the continuance counsel did not set forth what the witness McGuire would have testified, other than his rather indefinite statement, "I expect her to testify as to her opinion as to the soundness of mind" of testatrix upon the date of the will's execution. He did not say whether her opinion was that the testatrix was of sound or unsound mind. In an affidavit filed on motion for new trial, it appears that it was not until noon of the day to which contestant wanted the case continued that the whereabouts of Miss McGuire were learned. She was then in Stockton. The affidavit does not state when, if at all, she could have been produced at the trial.

[3, 4] Moreover, on the motion for a new trial, an affidavit of this witness was filed in which she stated that while Miss Lefranc at times was confused and sometimes would do eccentric things, witness would not testify that she was of unsound mind on the date of the execution of the will. She also stated that she had never discussed or attempted to discuss the nature or extent of testatrix' property with her. While this affidavit did not deny in detail all of the eccentricities and unusual actions of testatrix which the affidavit offered on motion for new trial stated Miss McGuire would testify to, it showed that so far as matters bearing on testamentary capacity are concerned her testimony would have been either of no value, or actually adverse, to contestant. Were the court's ruling incorrect (and it was not) it was not prejudicial. Motions for continuance, for permission to reopen the case, for calling witnesses out of order, are largely in the discretion of the trial court. It must be made to appear very clearly that such discretion has been abused before this court can reverse the trial court's action. No such showing was made here. 5 Cal.Jur. 990; 24 Cal.Jur. 731, 764.

2. Admission and Exclusion of Evidence.

(a) On direct examination of contestant she was asked: "Q. Now, *during that time* were you able to observe the family relationship that existed between your mother and father and aunt on one hand, and the family of Henry Lefranc on the other?" (Emphasis added.) She answered "Yes." Objection was then made that the question was irrelevant, incompetent and immaterial. A discussion then followed in which the contestant claimed that the evidence was admissible "as going to the background for the reasons for the making of a will and to show why, if at all, the particular person had closer claim on the testatrix than someone else." The court then asked what bearing that would have on her testamentary capacity on the day of the execution of the will. Counsel admitted that it would have no bearing on the question of testamentary capacity, but contended that it went to show damage to contestant, that is, why she could expect a will to be made in her favor rather than in favor of someone else; also that it bore on the question of competency as shown by a sudden change in the testatrix. In answering this, proponents' counsel, after some discussion, stated: "I don't think we are concerned or this record is concerned with some difficulty or row, or alleged row, that may have taken place between these ladies' relatives *way back in 1907*, and that is what counsel is trying to get to right now, and that is why we object." (Emphasis added.) Thereupon the court ruled: "Objection will be sustained *at this time*," and then counsel stated, "All right. We'll skip a good many years. * * *" (Emphasis added.)

[5, 6] We cannot say that the court's ruling that relationships existing in 1907 should not be gone into to determine the testatrix' state of mind in 1940, was error. Moreover, the court sustained the objection only *at that time*. Before contestant can complain of this ruling it was her duty later to present the matter to the court for a final ruling. As we said in Ford v. Carew & English, 89 Cal.App.2d 199, 208, 200 P.2d 828, 833: "The trial court, of course, has a wide discretion in directing the order in which evidence shall be submitted. Code Civ.Proc., sec. 2042. Even though the court were in error as to its ruling on the time of making such proof, it left the door open for plaintiff to produce the evidence later, and having failed to enter that door, she cannot now complain."

[7-9] (b) Opinion concerning mental condition of testatrix. Respondents asked witness Hale, a former chauffeur for the family, this question: "Now, based upon your observations of Miss Lefranc prior to and on January 20th, 1940, which is the day upon which this will was signed, what is your opinion regarding the mental condition of Miss Lefranc at the moment that she signed the will, that is the subject of this contest?" The court overruled an objection that the proper foundation had not been laid. Thereupon the following occurred:

"A. I would say that she was competent when she signed the will.

"Mr. Jones [attorney for contestant]: Which we move to strike the answer on the ground that it's not responsive, your Honor.

"The Court: Motion is denied.

"Q. In other words, she was of sound mind on that—"

Contestant's counsel thereupon interrupted with an objection which was sustained. Then followed this question and answer:

"Q. Was she of sound or unsound mind? A. I considered her of sound mind on that day."

Contestant does not press the objection on the ground of lack of foundation, apparently for the reason that the transcript shows that the witness was a sufficient acquaintance of the testatrix and saw her sufficiently, to entitle him to give his opinion under the intimate acquaintance rule, but contends that the court refused to allow contestant's witnesses to answer similar questions and therefore should not have permitted respondents' witness to answer this question. In the first place, the question was proper. Secondly, interestingly enough, contestant on this appeal has not questioned the court's rulings on those questions other than by stating in his reply brief for the first time that the court should have sustained her objection to respondents' question. We have examined the questions asked by contestant to which the court sustained objections and find that they were not questions, as was the one above, directed to the mental condition or sanity or insanity of the testatrix, but were questions of the type asking the witness as to whether in his opinion testatrix had testamentary capacity. This, it has been held, is a question for the jury to determine and is improper to ask of a witness. In re Estate of Taylor, 92 Cal. 564, 28 P. 603. Even though the court had erred in sustaining objections to questions asked by contestant of her witnesses, such fact would not have made improper a question asked by respondents of a witness, which question on all legal grounds was proper.

Contestant, on oral argument, for the first time, contends that the court erred in not striking out the witness' first answer "I would say that she was competent when she signed the will." In addition to the fact that contestant is rather late in making this contention, it is obvious from the question asked the witness and the proceedings and questions immediately following his answer, that the witness was not saying that the testatrix was competent to make the will, but was saying that she was mentally competent at the time she made the will. In other words, he was giving his opinion of her mental condition and not his opinion of her competency to make a will.

There was no error. The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

STEINER et ux. v. ROWLEY.

Civ. 17197.

District Court of Appeal, Second District, Division 2, California.

Feb. 15, 1950.

Hearing Granted April 13, 1950.*

Louis Steiner and Louise J. Steiner, husband and wife, sued Thomas James Rowley to recover a broker's commission paid to defendant.

The Superior Court of Los Angeles County, William B. McKesson, J., dismissed the action, and plaintiffs appealed from judgment dismissing the action and from orders sustaining demurrer to original complaint and to first amended complaint.

The District Court of Appeal, McComb, J., held that complaint did not state a cause of action.

Judgment of dismissal affirmed and purported appeals from orders sustaining demurrers dismissed.

1. Brokers 🔑43(2)

An oral contract under which a person is employed to purchase realty for others is unenforcible under statute of frauds at option of person against whom it is sought to be enforced. Civ.Code, § 1624, subd. 5.

2. Money received 🔑17(1)

Where plaintiffs could not recover under first count in complaint wherein all facts upon which plaintiffs' demand was based were specifically pleaded, a common count for money had and received under which recovery was based upon specific facts set forth in first count was demurrable.

3. Escrows 🔑8(1)

Where vendors and purchasers were parties to escrow, notice of escrow holder that vendors were paying a commission from escrow to person purchasers employed to purchase realty for purchasers, was imputable to purchasers.

4. Damages 🔑89(2)

Under statute stating in what cases exemplary damages may be allowed, exemplary damages may not be recovered for breach of obligation arising ex contractu. Civ.Code, § 3294.

5. Attachment 🔑4

A writ of attachment may issue properly only in an action ex contractu.

6. Action 🔑28

Plaintiffs by seeking and obtaining a writ of attachment elected to rely on an action ex contractu and waived right to remedy predicated on action ex delicto.

7. Damages 🔑87(2)

Exemplary damages may be recovered only upon allegation and proof of actual damages.

8. Appeal and error 🔑154(2)

Where a general demurrer was sustained to complaint, and plaintiffs elected to file an amended pleading, plaintiffs abandoned original complaint and could not urge on appeal that original complaint stated a cause of action.

9. Appeal and error 🔑102

An order sustaining a demurrer to complaint was not appealable.

◆

Charles C. Montgomery, Jr., Burbank, for appellants.

Harold A. Fendler, Beverly Hills, Robert W. Lerner, Beverly Hills, of counsel, for respondent.

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* Subsequent opinion 221 P.2d 9.

McCOMB, Justice.

Plaintiffs appeal from a judgment dismissing an action to recover a broker's commission paid to defendant after defendant's demurrer was sustained to the first amended complaint. There are also purported appeals from (1) an order sustaining the demurrer to the original complaint, and (2) an order sustaining a demurrer to the first amended complaint.

i. *Appeal from the Judgment of Dismissal of the Action.*

The complaint as amended was in four counts, the material allegations of which were as follows:

First Count

Pursuant to an *oral contract* plaintiffs employed defendant as an agent and broker for the purpose of representing them in the purchase of certain real property. The vendors of the real property paid plaintiffs $2,000 in connection with the purchase and sale of the property, which sum was paid through an escrow to which plaintiffs, as vendees, and the vendors of the property were parties.

Second Count

This cause of action was a common count for money had and received predicated upon the facts set forth in the first cause of action.

Third Count

This count alleged that plaintiffs had paid defendant the sum of $400 for services rendered and in addition he had received $2,000 from the vendors of the real property from the escrow "pursuant to instructions given to said bank by said" vendors.

Fourth Count

The fourth cause of action sought exemplary damages predicated upon the facts alleged in the first cause of action.

A general demurrer as to the first, second and third counts was sustained and plaintiffs given 20 days to amend. As to the fourth cause of action, it was sustained without leave to amend. Plaintiffs having declined to file an amended pleading, a judgment of dismissal was ordered.

Question

Did the complaint in any count state a cause of action?

This question must be answered in the negative.

[1] *Count I*: It was alleged that defendant had been employed by plaintiffs "pursuant to an oral contract" to purchase certain real property. Such contract was invalid under section 1624, subdivision 5, of the Civil Code which provides that an agreement authorizing or employing an agent or broker to purchase real estate for compensation or a commission is invalid unless the same or some note or memorandum thereof is in writing and is subscribed by the party to be charged or by his agent. Failure to comply with the provisions of this section renders the contract unenforcible at the option of the person against whom it is sought to be enforced. (Dessert Seed Co. v. Garbus, 66 Cal.App.2d 838, 845, 153 P.2d 184. Hence it is obvious that this count of the pleading failed to state a cause of action against defendant.

[2] *Count II*: The second count was a common count for money had and received predicated upon the specific facts set forth in the first count. Therefore it was proper to sustain the demurrer to the second count since, if plaintiffs are not entitled to recover under a count in a complaint wherein all the facts upon which their demand is based are specifically pleaded, it is proper to sustain a demurrer to a common count set forth in the complaint, the recovery under which is obviously based on the set of facts specifically pleaded in the other count. (Hays v. Temple, 23 Cal.App.2d 690, 695, 73 P.2d 1248; Rose v. Ames, 53 Cal.App.2d 583, 589, 128 P.2d 65.

[3] *Count III*: In the third count it was alleged that the commission paid by the vendors to defendant was from an escrow to which both plaintiffs (vendees) and the vendors were parties. Therefore, since the escrow holder had notice that the vendor was paying a commission to defendant, such notice was imputable to plaintiffs, the vendees, who were parties to the escrow. (See Early v. Owens, 109 Cal.App. 489, 494, 293 P. 136; Ryder v. Young,

9 Cal.App.2d 545, 553, 50 P.2d 495; Smith v. Brown, 1 Cal.App.2d 492, 495, 36 P.2d 1081.

Since plaintiffs had knowledge of the payments by the vendors to defendant, it is obvious that the latter could not have made a secret profit in the transaction, and a demurrer was properly sustained as to this count.

[4-7] *Count IV*: By this count plaintiffs sought to recover exemplary damages and it was therefore a tort action. Under section 3294 of the Civil Code exemplary damages may not be recovered for a breach of obligation arising ex contractu. In the present case plaintiffs sought and obtained a writ of attachment which may issue properly only in an action ex contractu. (Hallidie v. Enginger, 175 Cal. 505, 508, 166 P. 1. Therefore plaintiffs by seeking and obtaining a writ of attachment elected to rely on an action ex contractu, and waived their right to a remedy predicated on an action ex delicto. (DeLaval Pac. Co. v. United Cleaners & Dyers Co., 65 Cal.App. 584, 586, 224 P. 766. Cf. Smith v. Miller, 5 Cal.App.2d 564, 569, 43 P.2d 347; Steiner v. Thomas, 94 Cal.App.2d 655, 211 P.2d 321). Likewise the law is established that exemplary damages may be recovered only upon allegation and proof of actual damages. (Clark v. McClurg, 215 Cal. 279, 282, 9 P.2d 505, 81 A.L.R. 908; Mother Cobb's Chicken Turnovers, Inc., v. Fox, 10 Cal.2d 203, 205, 73 P.2d 1185). The pleading in the instant case failed to allege any actual damage. Hence the demurrer was properly sustained to this count of the pleading.

ii Purported Appeal from the Order Sustaining the Demurrer to the Original Complaint.

[8] Where, as in the present case, a general demurrer is sustained to a complaint and plaintiff elects to file an amended pleading, he abandons his original complaint and is not in a position to urge on appeal that the original complaint stated a cause of action and that the trial court erred in sustaining a general demurrer thereto. (Sheehy v. Roman Catholic Archbishop, 49 Cal.App.2d 537, 540, 122 P.2d 60; Alhambra Transfer, etc., Co. v. Muse, 41 Cal.App.2d 92, 93, 106 P.2d 63. Therefore plaintiffs' argument as to the original complaint will not be considered by us.

iii Purported Appeal from the Order Sustaining a Demurrer to the First Amended Complaint.

[9] An order sustaining a demurrer is not appealable. (Temple v. Horrall, 92 Cal.App.2d 177, 206 P.2d 909.) Hence the purported appeal from this order must be dismissed.

The judgment of dismissal is affirmed, and the purported appeals from the orders sustaining the demurrers are and each is dismissed.

MOORE, P. J., and WILSON, J., concur.

95 Cal.App.2d 911

PIRU CITRUS ASS'N v. WILLIAMS et ux.

Civ. 17094.

District Court of Appeal, Second District,
Division 3, California.
Feb. 6, 1950.

Action by the Piru Citrus Association against Clyde Williams and Love Williams, husband and wife, for liquidated damages for breach of a co-operative marketing agreement.

Verdict for defendants in the Superior Court of Ventura County, Louis C. Drapeau, J., plaintiff's motion for new trial was granted, and defendants appeal from such order. Plaintiff appeals from the order denying its motion for directed verdict, from an order denying its motion for judgment notwithstanding the verdict, and from the judgment.

The District Court of Appeal, Vallée, J., held that the order granting a new trial was not an abuse of discretion and that the denial of plaintiff's motion for judgment notwithstanding the verdict was proper. It further held that, in view of its conclusion, the plaintiff's appeal from the judgment was moot, and would be dismissed.

Order denying motion for judgment notwithstanding the verdict affirmed.

Order granting a new trial affirmed.

1. New trial ⚷163(1, 2)

The statute respecting grant of new trial does not require that the order specify insufficiency of the evidence to sustain the verdict in any particular words, and if the language used is susceptible of interpretation as tantamount to granting a new trial for insufficiency of evidence to sustain the verdict or if it may be inferred from the language used that such was the ground upon which the order was made, the order is deemed to have been based upon that ground. Code Civ.Proc. § 657.

2. New trial ⚷163(1)

Where nature of order granting new trial itself necessarily implies that trial court deemed it necessary to re-examine the facts, a statement in the order that evidence is insufficient is not essential. Code Civ.Proc. § 657.

3. New trial ⚷163(2)

When order granting a motion for new trial goes beyond a mere general order and uses any language that reasonably can be construed as including insufficiency of evidence, the language will be interpreted as including that ground. Code Civ.Proc. § 657.

4. Appeal and error ⚷933(4)
New trial ⚷163(2)

Where order granting new trial was a special order and testimony of defendant was recited and language of court was construable as meaning that the verdict for defendants was contrary to the evidence, the order was reasonably subject to the construction that it was based upon the ground of insufficiency of evidence to sustain the verdict, and presumption that it was not based upon such ground did not obtain. Code Civ.Proc. § 657.

5. Appeal and error ⚷977(3)

An order granting a new trial will not be reversed except upon a showing of a clear abuse of discretion.

6. Judgment ⚷199(3.6)

In action for liquidated damages for breach of a co-operative marketing agreement, where evidence was conflicting on the issue of whether plaintiff was estopped to assert any claim against defendants and jury returned a verdict for defendants, order denying motion of plaintiffs for judgment notwithstanding the verdict was not an abuse of discretion.

7. Appeal and error ⚷105

An order denying a motion for a directed verdict is nonappealable.

8. Appeal and error ⚷790(3)

Where order granting a new trial to plaintiffs was required to be affirmed, plaintiff's appeal from the judgment was moot and would be dismissed.

◆

James C. Hollingsworth and Don R. Holt, Ventura, for appellants.

John A. Calvin, Fillmore, and William T. Selby, Ventura, for respondent.

VALLÉE, Justice.

Appeal by defendants from an order granting a new trial in an action for liquidated damages for breach of a co-operative marketing agreement.

The cause was tried by a jury which rendered a verdict for defendants. Thereafter, upon motion of plaintiff, the court made the following order granting a new trial:

"In 1947 the defendants, husband and wife, purchased a citrus ranch in the vicinity of Piru in Ventura County. They also purchased 289 shares of the capital stock of the plaintiff. Plaintiff is a co-operative marketing association.

"Prior to the purchase of the stock, defendants' predecessor owner of the property had been a shareholder in the plaintiff Association and had delivered his fruit to the Association as such shareholder.

"The stock purchase was represented by defendant, Clyde Williams, signing an original copy of the bylaws and a promissory note for a balance of $430.00 due upon the stock by the former owner of the real property. This was January 4, 1947. The stock certificate was issued on the same day and was retained by the Association as collateral security for the payment of the note.

"The defendant testified that he did not read either the note or the bylaws, and that at the time he signed them he stated to the gentleman who prepared the documents for the Association, 'You are not going to handle this fruit. He further testified that the reason he signed the bylaws and the note was that he wanted to salvage something out of the stock but that otherwise he had no use for it.

"Shortly after the stock was purchased, defendant caused a letter to be written to the Association by his attorney advising the Association to stay off the property. No service was rendered by the Association, and no crops were taken off the property by the Association.

"On December 27, 1947, the defendant paid the balance due on the promissory note and the certificate of stock was delivered to him by the Association.

"The bylaws of the Association provide that no person who does not own citrus acreage may own stock; each shareholder agrees to deliver all marketable citrus fruit to the Association grown and matured upon his land, and the Association is empowered to pick, handle and market the crops. After sale of the fruit, the shareholder receives his pro-rata part of the proceeds of sale less costs of picking, processing and marketing. Liquidated damages at the rate of 25 cents per picked box are fixed, in the event of failure on the part of the shareholder to deliver fruit in accordance with the bylaws.

"This action was brought upon the liquidated damage clause. Trial was by jury, and verdict for the defendant. Motions for directed verdict and judgment notwithstanding the verdict were made and denied.

"On this motion for a new trial it is argued that [as] a matter of law the defendant could not at the same time sign the bylaws and the promissory note and repudiate the agreement therein expressed. I am of the opinion that this contention is correct, taking into consideration the testimony and admissions in the pleadings. Therefore the motion for a new trial is granted."

Defendants appeal from this order. Plaintiff appeals from an order denying its motion for a directed verdict, from an order denying its motion for judgment notwithstanding the verdict, and from the judgment.

The defendants' principal point is that the order granting the new trial does not specify insufficiency of the evidence to sustain the verdict as a ground upon which the new trial was granted; hence it must be conclusively presumed that it was not based upon that ground, and as there was no other valid ground upon which it could be based, it must be reversed. Code Civ.Proc., sec. 657.

[1-3] We think it sufficiently appears from the order that it was based upon the ground of insufficiency of the evidence to sustain the verdict. The statute does not require that the order specify insufficiency of the evidence to sustain the verdict in any particular words or language. If the language used is susceptible of being interpreted as tantamount to granting a new trial on account of the insufficiency of the evidence to sustain the verdict, or if it may be inferred from the language used that such was the ground upon which the order was made, it is uniformly held to have been based upon that ground. Where the nature of the order itself necessarily implies that the trial court deemed it necessary to reexamine the facts, a statement in the order that the evidence is insufficient is not essential. When the order granting the motion goes beyond a mere general order (a new trial is granted) and uses any language that reasonably can be construed as including insufficiency of the evidence, the language will be interpreted as including that ground.

The following cases enunciate the foregoing rules and hold that the orders specified were based upon the ground of the insufficiency of the evidence to sustain the verdict: Griffey v. Pacific Electric Ry. Co., 58 Cal.App. 509, 512, 209 P. 45, 46 ("on the ground of 'excessive damages'"); Beckley v. Harris, 84 Cal.App. 557, 558, 258 P. 428, 429 ("granted upon all the grounds stated in the notice of intention to move for a new trial in the files and minutes of the court"); to the same effect, Lewis v. Southern California Edison Co., 116 Cal.App. 44, 49, 2 P.2d 419; Lucerne Country Club v. Beal, 21 Cal.App.2d 121, 123, 68 P.2d 408, 409 ("that a new trial be, and the same is hereby granted as to all issues made by the said cross-complaint of the said R. J. Palmer and the answer thereto"); Secreto v. Carlander, 35 Cal. App.2d 361, 363, 95 P.2d 476, 477 ("If defendant files a written consent that the Verdict and Judgment on behalf of the minor Lois Jean Secreto, be amended so as to award said plaintiff $1200.00 instead of $150.00, the motion for a new trial will be denied; otherwise the motion will be granted"); Bayley v. Souza, 42 Cal.App. 2d 166, 167, 108 P.2d 725, 726 ("It is ordered by the Court that plaintiffs' motion for new trial as to defendant George A. Souza be and the same is hereby granted on all issues.")

In Estate of Bainbridge, 169 Cal. 166, the court stated, at page 169, 146 P. 427, 428: "In the determination of a motion for a new trial, the verdict should be set aside if, in the opinion of the trial court, it is not supported by sufficient evidence; and this is equally true whether there be an absence of evidence or that the evidence received, in the individual judgment of the trial judge, is lacking in probative force to establish the proposition of fact to which it is addressed. This is the meaning of the terms 'insufficiency of evidence' (subdivision 6, § 657, C.C.P.), and '* * * contrary to * * * evidence' (subd. 6, § 1181, Pen. Code)." Insufficiency of the evidence means want of evidence, as well as contrary to the weight of evidence. Southern Pacific Land Co. v. Dickerson, 188 Cal. 113, 117, 204 P. 576. "The term 'insufficiency of the evidence' means either an absence of evidence or that the evidence admitted at the trial is lacking in probative force to establish the proposition of fact to which it is addressed." Mosekian v. Ginsberg, 122 Cal.App. 774, 777, 10 P.2d 525, 527. A new trial, granted upon the ground the verdict is against admissions of a party who was called as a witness, is granted upon the ground that the evidence was insufficient to justify the verdict. Lorenzana v. Camarillo, 41 Cal. 467. Where the court grants a new trial to a defendant upon the ground that it had erred in denying motions for judgment of nonsuit, it is practically and substantially granted for insufficiency of the evidence. Fox v. Southern Pacific Company, 95 Cal. 234, 30 P. 384. An order granting a new trial upon "the ground alone of plaintiff's contributory negligence" is in effect "an order granting the motion upon the ground that the evidence was insufficient to justify the implied finding of the jury that the plaintiff was not guilty of negligence which caused or contributed proximately to the accident and injury." McNeely v. Hill, 52 Cal.App. 184, 186, 198 P. 427, 428.

[4] The order under review was not a general order. It was a special order. The testimony of the defendant is recited. It is stated that upon the motion for a new trial it was argued that as a matter of law the defendant could not at the same time sign the by-laws and the promissory note and repudiate the agreement expressed therein. The court says that "taking into consideration the testimony and admissions in the pleadings" this contention is correct. In other words, the verdict for the defendants is contrary to the evidence. The order is reasonably subject to the construction that it was based upon the ground of the insufficiency of the evidence to sustain the verdict.

[5] No claim is made that the court abused its discretion in granting the motion if in fact the order was based upon the ground of the insufficiency of the evidence to sustain the verdict. Defendants concede that the evidence was conflicting. An order granting a new trial will not be reversed except upon a showing of a clear abuse of discretion. Brook v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 307, 163 P.2d 689; Busby v. Silverman, 82 Cal. App.2d 393, 394, 186 P.2d 442.

Thomas v. Driscoll, 42 Cal.App.2d 23, 108 P.2d 43, relied on by defendants, is not analogous. The order in that case was general. It was "Motion of plaintiffs for a new trial heretofore made is granted."

[6] We next consider plaintiff's appeal from the order denying its motion for judgment notwithstanding the verdict. Defendants pleaded that plaintiff is estopped to assert any claim against them. The evidence on this issue was conflicting. We cannot hold that the court erred in denying the motion.

[7, 8] Since an order denying a motion for a directed verdict is nonappealable Estate of Alegria, 87 Cal.App.2d 645, 659, 197 P.2d 571, the plaintiff's appeal from that order is dismissed. In view of our conclusion that the order granting a new trial must be affirmed, the plaintiff's appeal from the judgment is moot and is dismissed.

The order denying the motion for judgment notwithstanding the verdict is affirmed. The order granting a new trial is affirmed.

SHINN, P. J., and WOOD, J., concur.

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96 Cal.App.2d 65

OWEN et al. v. McDONALD et al.

Civ. 4109.

District Court of Appeal, Fourth District, California.

Feb. 11, 1950.

Rehearing Denied Feb. 28, 1950.

Hearing Denied April 11, 1950.

Henry G. Owen and Henry G. Owen as executor of the estate of Caroline H. Owen, brought action against Howard McDonald and another for rescission of contract for purchase by plaintiffs of defendants equipment, stock in trade, and good will of restaurant business.

The Superior Court of Orange County, Raymond Thompson, J., rendered a judgment for the defendants, and the plaintiffs appealed.

The District Court of Appeal, Mussell, J., held that evidence sustained findings that no items of personalty were missing which should have been included in inventory, that there were no fraudulent representations by defendants as to gross income, expenses, and net income, and that assignment of lease was made in escrow within time required by contract, so that plaintiffs were not entitled to rescission.

Judgment affirmed.

1. Sales 🔑181(11)

In action by buyers against sellers for rescission of contract for the purchase of equipment, stock in trade, and good will of restaurant business, and for damages, evidence sustained finding that there were no items of personalty missing which should have been included in the inventory by sellers, so as to entitle buyers to rescission.

2. Appeal and error 🔑1010(1)

Trial court's finding supported by substantial evidence would not be disturbed on appeal.

3. Appeal and error 🔑1008(1)

In action by buyers for rescission of contract for the purchase of equipment, stock in trade, and good will of restaurant business, and for damages, whether fraudulent representations had been made by sellers to buyers as to gross income, expenses, and net income of business, so as to entitle buyers to rescission, was a fact question for trial court as trier of facts.

4. Fraud 🔑58(1)

A finding of wilful fraud must be based on evidence that is clear and convincing and free from ambiguity.

5. Landlord and tenant 🔑80½

In action by buyers for rescission of contract for the purchase of equipment, stock in trade, and good will of restaurant business, and for damages, evidence sustained finding that assignment of lease was made in escrow on date specified in contract, and that buyers were not entitled to rescind on ground that there had not been timely assignment.

◆

Meyer & Dreizen, N. D. Meyer and Samuel Dreizen, Santa Ana, for appelllants.

James E. Walker, Santa Ana, for respondents.

MUSSELL, Justice.

Action for recision of contract for purchase of personal property and for damages. Plaintiffs and defendants entered into a written agreement contained in escrow instructions wherein plaintiffs agreed to buy and defendants to sell the furnishings, fixtures, equipment, stock in trade and good will of the business known as "McDonald's Cottage Shops" in the city of Anaheim. The purchase price of $9,000 was deposited in escrow, together with the sum of $500 to cover two months rent on the premises and one-half of the escrow fee and other items. The agreement was dated April 13, 1948, and provided, among other things, for the publication of a notice of intention to sell as required by the provisions of Section 3440 of the Civil Code. This notice contained a recital that the purchase price would be paid at 10:00 o'clock A.M. on the 21st day of April, 1948. Possession of the premises was given to plaintiffs on April 16th and all adjustments and "prorations" in the escrow were to be made as of that date. The instructions further provided that in the event the conditions thereof had not been fulfilled at the time provided, the escrow company was instructed to complete the escrow, unless written demand was made upon it for the return of money and instruments deposited by the parties. Time was not made the essence of the agreement and it contained no definite closing date. The escrow instructions also contained a provision that the sellers should obtain for the purchasers a copy of the lease covering the premises, together with an assignment thereof, assigning it to the plaintiffs, husband and wife as joint tenants.

On April 21st, 1948, the plaintiffs gave notice in writing to the escrow company, cancelling all previous instructions and demanding the return of the funds deposited by them in the escrow and on June 3, 1948, filed the instant action for recision of the contract to purchase and for damages, alleging, among other things, that upon taking possession of the premises, the following items were missing: 1 automatic toaster, 2 ladles, 1 exhaust fan, 1 sugar scoop and several glass pie plates, which were listed in the inventory previously furnished; that the assignment of the lease had not been made as agreed and that the defendants had falsely and fraudulently represented to the plaintiffs that the average daily gross income of the business was $131.11, the average daily expense $90.55 and the daily net income of the profit was running $40.56; that the average daily gross business for the year 1947 was between $100 and $130, with a net income of approximately $40.00 per day and that the plaintiffs were induced to enter into the contract to purchase by reason of these representations.

The action was tried by the court without a jury and plaintiffs appeal from a judgment in favor of the defendants.

The court found that the assignment of the lease was made and deposited in escrow within the time allowed therefor; that no items were missing which should have been included in the inventory; that it was not true that the defendants or either of them falsely or fraudulently represented the average daily gross income, the expense or net income of the business. It was further found that the plaintiffs had not relied upon any such representations and were not induced thereby to enter into the contract of purchase. The plaintiffs attack these findings upon the ground that they are contrary to the evidence.

[1, 2] There is substantial evidence in the record to support the finding of the court that no items of personal property were missing which should have been included in the inventory and that the described items were not intended by the parties to be included therein. While the evidence is conflicting in this respect, the court's finding will not be disturbed on appeal. Fackrell v. City of San Deigo, 26 Cal.2d 196, 207, 157 P.2d 625, 158 A.L.R.

773; Crawford v. Southern Pac. Co., 3 Cal.2d 427, 429, 45 P.2d 183.

There is a sharp conflict in the evidence concerning the alleged misrepresentations as to the income and expenses of the business. Defendant Howard McDonald testified that some time in January, 1948, he gave plaintiff Henry G. Owen a copy of the capital investment record of the business; that Mr. and Mrs. Crawley (who were interested with the plaintiffs in the operation of the restaurant were present; that there was a general discussion of the business and the quoted price; that he told them the gross income had been from $100 to $130 a day; that the gross income shown on the capital investment record was correct for the period of October 3, 1947 to December 18, 1947; that he made no statement to the Crawleys or anyone else concerning his net income and that in the early part of April, 1948, he informed the Crawleys that the average income would vary between $55 and $125 a day; that he gave plaintiff Owen the figures of his March, 1948, expenses and that they were correct to the best of his knowledge; that he had not discussed the contents of the capital investment record with the plaintiffs and had informed the Crawleys of the dates covered by the capital investment record.

There was testimony by William P. Watson, the real estate broker who handled the transaction for the defendants, that he had discussed the profit and loss schedule and the capital investment record with the Crawleys and had stated to them that the figures were accurate as to income, but as to the expenses, it was an estimate by Mr. McDonald and not accurate.

The testimony of the plaintiff Owen and the Crawleys as to the representations made by defendant McDonald was not clear, satisfactory and convincing. Mr. Owen testified that the only representation made to him by McDonald before April 13th was that the business grossed daily from a "hundred to a hundred and thirty dollars" and in his cross-examination on the subject Owen stated that he believed that Mr. McDonald's figures were from $100 to $130 a day; "that there wasn't any definite figure given; that he did not recall whether McDonald had represented that the gross expense was $90.55 per day".

Owen further testified that he and the Crawleys "figured it out" that there would be $40.00 a day net profit from information given them on the 13th of April, but in his cross-examination Owen stated that he did not recall that there was any statement made on the 13th day of April concerning the gross daily receipts.

[3, 4] The inconsistencies of the statements of the plaintiffs as to the claimed representations may well have resulted in the decision of the trial court to believe the testimony of the defendants, which it apparently did. Whether fraudulent representations were made was a question of fact for the court. Doulliard v. Smith, 70 Cal.App.2d 522, 525-526-527, 161 P.2d 378. Under the circumstances, the finding that there were no fraudulent representations made is conclusive on appeal. A finding of wilful fraud must be based upon evidence that is clear and convincing and free from ambiguity. Podlasky v. Price, 87 Cal.App.2d 151, 161, 196 P.2d 608.

[5] Appellants' final argument that an assignment by the defendants of the lease had not been made in escrow on April 21st is without merit. The contention apparently is based upon the fact that the consent of the owner of the property, defendants' lessor, had not been obtained in writing on said date. The lease provided that the lessees were "not to assign this lease nor sublet the premises or any part thereof without the consent in writing of lessors or either of them first had and obtained". The escrow instructions were silent as to who should obtain the consent of Dr. Jacobs, owner of the property, to the assignment of the lease to plaintiffs herein. The record indicates that both McDonald and Owen had been to see Dr. Jacobs some time before April 21st and that he had told McDonald that he had no objection to the assignment of the lease "as long as he got someone that was responsible". It further appears that written consent was given to the assignment by Dr. Jacobs and his wife, which consent was dated April 21, 1948, but not put in escrow, until a few days later. The trial court found that it was

not true that the assignment by defendants of said lease had not been made in escrow by 10:00 o'clock A.M., April 21, 1948, and we cannot say that such finding is unsupported by the evidence.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

96 Cal.App.2d 29

PEOPLE v. VERDIER.

Cr. 2635.

District Court of Appeal, First District, Division 2, California.

Feb. 9, 1950.

Keith Verdier was convicted on a plea of guilty and plea for probation in the Superior Court in and for the County of Santa Clara, William F. James, J., of robbery in the first degree, and he appealed.

The District Court of Appeal, Dooling, J., held that trial court's failure to take any evidence upon degree of defendant's crime was error, and that court's reference to testimony of a complaining witness taken on trial of co-defendant who was acquitted of charge by a jury in another trial was not sufficient basis to fix degree of crime with which defendant was charged.

Order fixing degree of crime reversed with directions to determine degree of crime upon evidence taken for that purpose.

1. Criminal law 🔑980(2)

Under statute providing that after a plea of guilty to crime divided into degrees, court must, before passing sentence, determine degree, the hearing to determine degree of the offense is not a "trial" in its full technical sense, and court may consider matters not admissible on issue of guilt or innocence. Pen.Code, § 1192.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Trial".

2. Criminal law 🔑980(2)

Under statute providing that after a plea of guilty of a crime divided into degrees, court before passing sentence must determine degree, court should take evidence in presence of defendant to determine degree of crime. Pen.Code, § 1192.

3. Criminal law 🔑980(2)

Under statute conferring jurisdiction upon court to determine degree of crime of which a defendant is charged under a plea of guilty, there must be a judicial determination, and where power is expressly conferred upon a court of general jurisdiction to determine a particular question, and no special mode for that determination is set forth, jurisdiction conferred necessarily implies authority in such court to call same aid as is usually employed by court in reaching a judicial determination in other cases. Pen.Code, § 1192.

4. Criminal law 🔑1144(17)

On appeal from conviction of robbery in first degree after plea of guilty, Court of Appeal would presume that record was complete on determination of degree of defendant's crime, and where record on its face did not show evidence was taken to establish degree of defendant's crime, court would not presume that evidence was taken. Rules on Appeal, rule 52; Pen.Code, § 1192.

5. Criminal law 🔑980(2)

Testimony taken in separate proceedings against co-defendant, to which defendant was not a party and in which he had no right or opportunity of cross-examination or of offering evidence in his own behalf, was not evidence in defendant's prosecution for purpose of determining, after his plea of guilty, degree of his offense. Pen.Code, § 1192.

6. Criminal law 🔑980(2)

Information charging defendant with robbery under statute providing that all robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon is robbery in first degree, but not charging defendant was armed with a deadly weapon, was sufficient to support conviction for robbery in first degree. Pen.Code, §§ 211a, 969c.

7. Indictment and information ⚷59

The degree of a crime is not required to be included in charge.

W. E. Overson, P. B. Zavlaris, San Jose, attorneys for appellant.

Fred N. Howser, Attorney General of the State of California, David K. Lener, Deputy Attorney General, N. J. Menard, District Attorney of Santa Clara County, San Jose, Allan P. Lindsay, Assistant District Attorney, San Jose, attorneys for respondent.

DOOLING, Justice.

Appellant was charged jointly with one F. W. with the crime of robbery. He pleaded guilty and asked for probation. Probation was denied, the court fixed the degree at first degree robbery and sentenced appellant for the term prescribed by law.

The appellant presents a reporter's transcript of the proceedings at which the degree was determined by the court from which it appears that no evidence was taken on the subject. Instead the court referred to the testimony of a complaining witness taken on the trial of the co-defendant who was acquitted of the charge by a jury, and concluded from his recollection of that testimony that the crime was robbery of the first degree.

[1, 2] Under Penal Code section 1192 after a plea of guilty of a crime divided into degrees "the court must, before passing sentence, determine the degree." While a hearing to determine the degree of an offense held under this section is not a trial in its full technical sense and the court may consider matters not admissible on the issue of guilt or innocence, People v. Williams, 14 Cal.2d 532, 95 P.2d 456; In re Steve, 73 Cal.App.2d 697, 167 P.2d 243, the burden of the decisions is that the court should take evidence in the presence of the defendant to determine the degree of the crime, People v. Mendez, 27 Cal.2d 20, 161 P.2d 929; People v. Bellon, 180 Cal. 706, 182 P. 420; People v. Chew Lan Ong, 141 Cal. 550, 75 P. 186, 99 Am.St.Rep. 88; People v. Stratton, 133 Cal.App. 309, 24 P.2d 174; People v. O'Brien, 122 Cal.App. 147, 9 P.2d 902; People v. Paraskevopolis, 42 Cal.App. 325, 183 P. 585.

In People v. Chew Lan Ong, supra [141 Cal. 550, 75 P. 187], the claim was made that sec. 1192 Pen.Code "is unconstitutional because it does not provide any manner or mode whereby the court is to reach its determination of the degree of the crime."

The court said, 141 Cal. at pages 552–553, 75 P. at page 187, 99 Am.St.Rep. 88:

[3] "Jurisdiction to determine the matter is, however, expressly conferred on the court by the section. This means that there shall be a judicial determination; and where power is especially conferred upon a court of general jurisdiction to determine a particular question, and no special mode for that determination is pointed out, the jurisdiction conferred necessarily implies authority in such court to call to its assistance in determining the particular question the same aid as is usually employed by it in reaching a judicial determination in other cases.

"The universal aid is evidence. This was the means employed by the lower court in determining the degree of crime in the case at bar. It is the only means by which a judicial determination can be had, and was the means which it was contemplated by the Legislature should be invoked by the court."

In People v. Bellon, supra, we read at 180 Cal. 707, 182 P. at page 421, "The appropriate and proper method for a court to pursue in such a case is to receive such competent evidence from the respective parties as is material to the question of degree, and, the evidence having been concluded, to pronounce its determination thereon."

Again in People v. Paraskevopolis, supra, the proper procedure is outlined, 42 Cal.App. at page 330, 183 P. at page 587: "So, where there is a plea of guilty in such a case, there must first be some foundation for the exercise by the court of its judgment as to the punishment which should be inflicted, the penalty for the two degrees of murder or of burglary (also divided into degrees) being different. The only legal way such foundation can be laid is, as section 1192 plainly and peremptorily points out, for the court to ascertain and determine the degree, and this can be done properly only by taking evidence addressed to that fact; and if in any case of a plea of guilty to a crime divided into degrees that has not been done—that is, that such determination has not been made in an appropriate legal way—then the judgment of sentence has not been legally pronounced."

In People v. O'Brien, supra, the defendant was remanded to the trial court with directions to determine the degree after taking evidence on that subject. In determining the degree in that case the trial court had acted solely on the report of the probation officer. The court reviewed the authorities, 122 Cal.App. at pages 154–157, 9 P.2d at pages 904, 905, and concluded that the defendant had not been accorded the hearing to which he was entitled, saying, 122 Cal.App. at page 155, 9 P.2d at page 905: "Notwithstanding the fact that it has been decided that the hearing which may be conducted by the trial court for the purpose of determining the degree of the offense 'is not a trial,' nevertheless the only means by or through which the court is authorized to reach a conclusion in the matter is by the aid of evidence."

Finally in People v. Mendez, supra, the court said tersely, citing earlier cases, 27 Cal.2d at pages 23–24, 161 P.2d at page 931: "It (the degree of the crime) is a matter * * * which must be determined by the court on competent evidence before passing sentence under a plea of 'guilty'."

[4] The attorney general asks us to presume that evidence was taken citing People v. Rhodes, 137 Cal.App. 385, 30 P.2d 1026. Under Rule 52, Rules on Appeal, we must presume that the record is complete on the point and we can no longer presume that something not shown by the record occurred in the trial court to cure an error apparent on the face of the record. People v. Hidalgo, 78 Cal.App.2d 926, 941, 179 P.2d 102.

Entirely apart from that rule, however, respondent's argument makes it clear that no testimony was in fact taken and no proper hearing held for the purpose of fixing the degree of the crime, as the following statement in respondent's brief makes clear: "While it does not appear testimony was taken prior to rendition of judgment at the arraignment to establish the degree of robbery, yet it appears from the reporter's transcript the degree of the offense was founded on ample evidence."

This "evidence" is then definitely identified by respondent as follows: "The evidence, the basis of the finding of the degree of the offense, was the testimony of Mrs. Marshall *in the trial of * * * the accomplice of appellant Verdier.*" (Emphasis added.)

Thus in the instant case there would appear to be no room for any presumption such as there was in the Rhodes case, even in the absence of the present Rule 52.

The trial of appellant's accomplice was a separate proceeding, to which appellant was not a party, and *in which the accomplice was found not guilty.*

Mrs. Marshall was one of the victims of the hold-up and her testimony in that trial is brought before this court not as part of the settled record on appeal but interjected into the argument as an appendix to respondent's brief.

[5] It is clear that testimony taken in that separate proceeding, to which appellant was not a party and in which he had no right or opportunity of cross-examination or of offering evidence in his own behalf, was not evidence in his own case for the purpose of determining, after his plea of guilty, the degree of *his* offense.

[6, 7] With respect to appellant's other point based on People v. Lesterjette, 40 Cal.App.2d 327, 104 P.2d 844, that under section 969c, Penal Code the fact that defendant was armed with a deadly weapon must be charged in the information if that fact is to be relied on in fixing the degree it is sufficient to point out that sec. 969c makes no reference to section 211a, Penal Code. The latter section provides: "All robbery which is perpetrated by torture or

by a person being armed with a dangerous or deadly weapon is robbery in the first degree * * *", but it is not necessary to allege such facts as long as the information or indictment charges the crime. People v. Meyers, 31 Cal.App.2d 515, 88 P.2d 212. The degree of a crime is not required to be included in the charge. People v. Mendez, supra, 27 Cal.2d 20, 23, 161 P.2d 929.

The order fixing the degree of the crime is reversed with directions to the court below to determine the degree of the crime upon evidence taken for that purpose and thereafter to pronounce judgment on defendant accordingly.

NOURSE, P. J., and GOODELL, J., concur.

* * *

95 Cal.App.2d 902

PEOPLE v. PULLINS.

Cr. 4392.

District Court of Appeal, Second District,
Division 2, California.
Feb. 6, 1950.

Leonard Roy Pullins was convicted in the Superior Court, Los Angeles County, Charles W. Fricke, J., of assault by means of force likely to produce great bodily injury and defendant appealed.

The District Court of Appeal, Moore, P. J., held that the evidence was sufficient to sustain the conviction.

Affirmed.

1. Assault and battery 🔑95

In prosecution for assault by means of force likely to produce great bodily injury, whether force applied and means used were calculated to produce great bodily injury is question for trier of fact. Pen.Code, § 245.

2. Assault and battery 🔑92

Evidence that defendant chewed prosecuting witness' finger until its flesh was lacerated and bones were broken sustained conviction for assault by means of force likely to produce great bodily injury. Pen. Code, § 245.

3. Assault and battery 🔑55

It is not essential to conviction for assault by means of force likely to produce great bodily injury that an intent severely to injure by use of force be proved or that injuries be serious but fact that prosecutrix was disfigured and disabled was conclusive proof that defendant's chewing of her finger produced great bodily injury. Pen. Code, § 245.

4. Assault and battery 🔑55

The gravamen of assault by means of force likely to produce great bodily injury is the likelihood that great bodily injury will result from the force applied and not that an injury actually resulted. Pen.Code, § 245.

5. Assault and battery 🔑63

Where woman manager of rooming house asked defendant to desist from kicking door but he responded by cursing and kicking at her, statute providing that resistance is lawful if made to a public offense by party about to be injured was not available to defendant charged with assault by means of force likely to produce great bodily injury. Pen.Code, §§ 245, 692.

6. Criminal law 🔑260(11)

In prosecution for assault by means of force likely to produce great bodily injury, whether prosecutrix' failure to scream was proof that she was not attacked was not open to review where decided adversely to defendant by trial court. Pen.Code, § 245.

◆

Gladys Towles Root, Los Angeles, for appellant.

Fred N. Howser, Attorney General, William E. James, Deputy Attorney General, for respondent.

MOORE, Presiding Justice.

Having been convicted by the court of assault by means of force likely to produce great bodily injury defendant appeals, asserting the insufficiency of the evidence to sustain the judgment.

The prosecutrix was manager of a rooming house. About eleven o'clock in the evening appellant was found in the hallway kicking on a door near the apartment of prosecutrix. When she asked him to leave he approached her door, kicked at and called her profane names. She struck at him with her left fist but he caught her hand and pulled it to his mouth and chewed and broke her index finger. For 15 minutes they struggled on her bed. She was unable to remove her finger from his mouth until after she had hit him on the cheek with a stick. On hearing the scuffle, Miss Brooks, a tenant on the floor above, entered and separated them and found the bed bloody and both holding a stick which the prosecutrix obtained after the combat had commenced. Appellant told the officer who arrested him that he was trying to gain entrance to the room of a friend when the prosecutrix came out and they engaged in a fight "and that her finger was in his mouth, so he chewed it."

The skin and muscle of the finger had been mangled. Later her physician burned away the proud flesh, and bones (which she exhibited) came out. The wound resulted in a bent, immobile finger, as the trial judge observed.

[1-4] Appellant contends that the mere biting of a finger as occurred here will not justify a conviction under section 245 of the Penal Code.[1] The facts established by the adopted proof do not indicate so simple a matter as appellant claims. The prosecutrix must bear a helpless member of her body throughout her life. No explanation or excuse will justify a reasonable mind in concluding that an aggressor who chews a person's finger until its flesh is lacerated and its bones are broken has any intention other than the maiming or crippling of his victim. The force required to cause such a wound as that inflicted upon this young lady was not only "likely to produce great bodily injury" but it was certain to cause it. The statute does not define the means to be used as requisite to a conviction. Its language "is a general and comprehensive term designed to embrace many and various means or forces." People v. Hinshaw, 194 Cal. 1, 17, 227 P. 156, 163. Whether the force applied and the means used were calculated to "produce great bodily injury", is a question for the trier of fact. They are sufficient under the statute so long as they are "likely to produce great bodily injury." A grain of wheat may be blown with sufficient force to destroy the vision of an eye; a pillow in the hands of a demon may be the instrument of murder. While it is not essential to a conviction under section 245 that an intent severely to injure by the use of force be proved, People v. Schmidt, 66 Cal.App.2d 253, 256, 152 P.2d 1021, or that the injuries be serious (Ibid.) still the fact that the prosecutrix was disfigured and disabled is conclusive proof that the chewing of her finger did produce great bodily injury. People v. Montes, 91 Cal.App.2d 222, 204 P.2d 659. Since appellant's act caused such result the trial court had to determine only that his act was a "means of force likely to produce" the injury. It was aided in deriving such finding by appellant's admission that he did not turn loose prosecutrix' finger from between his teeth until after she had struck him with the stick.

People v. Fuentes, 74 Cal.App.2d 737, 169 P.2d 391, is not authority for holding that the disablement of a woman by crushing the bones of her finger is not the kind of force contemplated by the statute. Fuentes merely struck his victim with his fist. Because the latter slumped and struck his head against a railroad track with unfortunate results he was not guilty of using force which was in itself likely to produce great bodily injury. The gravamen of the offense is the likelihood that great bodily injury will result from the force applied, People v. McIlvain, 55 Cal.App.2d 322, 331, 130 P.2d 131, not that an injury actually resulted. People v. Day, 199 Cal. 78, 85, 248 P. 250; People v. Tallman, 27 Cal.2d 209, 212, 163 P.2d 857.

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[1] "Every person who commits an assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury is punishable by imprisonment in the State prison not exceeding ten years, or in a county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both such fine and imprisonment."

[5] Appellant contends that he did not assault prosecutrix before she struck him and that he acted in self-defense. For this there is no support in the record. She asked him to desist from kicking the door. He responded by cursing and kicking at her. Her subsequent use of a stick was a defensive act. Section 692 of the Penal Code does not avail him. It provides that resistance is lawful if made to a public offense by "the party about to be injured." Was appellant about to be injured when he kicked at prosecutrix who weighed 160 as against appellant's 192 pounds? Toughened by his toil as a car polisher and life in the open he could not reasonably have apprehended danger from a woman manager of a rooming house whose primary mission at late hours was to keep peace and quiet for her tenants.

[6] Whether prosecutrix' failure to scream was proof that she was not attacked was decided adversely to appellant by the trial court and is not open to review.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

34 Cal.2d 745

CONROY v. WOLFF et al. (STEFFEN et al., Interveners).

S. F. 17869.

Supreme Court of California, in Bank.

Feb. 21, 1950.

Mandamus proceeding by Peter Conroy against Harry K. Wolff and others, individually and as constituting the Civil Service Commission of the City and County of San Francisco, to compel respondents to give petitioner credit for a meritorious award in a promotional examination for captain of the police department. August G. Steffen and others intervened.

The Superior Court for San Francisco County, Edward Molkenbuhr, Judge pro tem., denied a writ of mandate, and petitioner appealed.

The Supreme Court, Shenk, J., held that the city charter required that the cutting off date for application of meritorious service credits should not be earlier than the date of a written examination in absence of a valid regulation prescribing a different date.

Judgment reversed.

Prior opinion, see 208 P.2d 1023.

Municipal corporations ⚷217(5)

Under charter of city and county of San Francisco providing that Civil Service Commission shall provide for promotion on basis of written examination and that in addition to credit for seniority, ten per cent of total credits allowed for examination shall be allowed for merit, cutting off date for application of meritorious service credits could not be earlier than date examination was in fact held, in absence of regulation prescribing a different date adopted pursuant to requirements of the charter governing rule making.

◆

Charles P. Scully and Thomas M. Mulvihill, San Francisco, for appellant.

Dion R. Holm, City Attorney, Walter A. Dold, Chief Deputy City Attorney, James C. Purcell and William E. Ferriter, San Francisco, for respondents and interveners.

SHENK, Justice.

This is an appeal from a judgment denying a writ of mandate to compel the Civil Service Commission of San Francisco to consider and allow a credit in a promotional examination.

Appellant, Peter Conroy, is a lieutenant in the San Francisco Police Department. He filed an application to take a promotional examination for Captain. The regulations for the examination were published by the Civil Service Commission on July 7, 1946, in an official publication known as the "scope circular." This circular designated November 8, 1946, as the "Beginning Date of Examination." The examination was postponed. On December 5, 1946, before the examination was held, Conroy was the recipient of a meritorious award from the Meritorious Award Board for service performed in an arrest occurring November 16, 1946. The examination was held December 12, 1946. Conroy requested that he be given credit on his examination for his meritorious award. The Commission denied his request on the ground that the award was made after the official "Beginning Date of Examination." If the credit had been allowed, Conroy would have ranked about 8th on the list of eligibles for promotion. Otherwise he ranked 15th.

Conroy contends that the city charter compels the Commission to grant him the credit. Section 146 of the charter provides: "Whenever it deems it to be practicable, the civil service commission shall provide for promotion in the service on the basis of such examinations and tests as the commission may deem appropriate, and shall, in addition, give consideration to ascertain merit and records of city and county service of applicants. * * * All such promotive examinations in the police and fire departments shall be entirely of a written character * * *." Subsection (d) provides: "In addition to the foregoing credits for seniority [covered in subsections (a), (b), and (c)], ten per cent of the total credits allowed for said examination shall be allowed for ascertained merit and meritorious public service; * * *."

The Commission concedes that the granting of credit for meritorious service is mandatory under the terms of the charter. It argues, however, that it has discretion to set a "cutting off date" for computing such credits which may be earlier than the date the examination is actually held. It maintains that in this case it had designated as such date the official beginning date of the examination as noted in the scope circular. The Commission has adopted such a rule for "seniority" credits and argues that the same rule is intended to apply to meritorious service credits.

The fair import of the language in the charter is that meritorious service is to be credited as of the date examinations are actually held. Section 146 deals with written examinations. Section 146(d) speaks of credit for meritorious service "for said examination." The charter thus seems to make credit for meritorious service an integral part of the written examination. In other words an applicant's examination is graded not only by his written answers but also by his standing in meritorious service.

The discretionary power of the Commission to apply the language of the charter by the adoption of a rule or regulation is not involved here. Assuming that the Commission could promulgate a rule setting a cutting off date for meritorious service credits, it has not done so.

The Commission's action in Conroy's case cannot be deemed the equivalent of a rule. It does not meet the requirements of section 141 of the charter. That section requires that changes in rules be published, requires that one week's notice be given, and provides that no change in the rules shall affect a case pending before the Commission. None of these requirements has been met. Also, section 333, Part I, of the San Francisco Municipal Code requires that "Rules * * * of any * * * commission * * * that are of general public concern shall be posted in a conspicuous place, or available for public inspection * * *." The application of credits for meritorious service would appear to be a matter of "general public concern" within the scope of the ordinance.

The promulgated rule covering seniority credits cannot be regarded as a rule covering meritorious service credits. There was nothing in its language to indicate that it covered meritorious service.

The scope circular cannot be deemed to have established a rule. It merely stated that credit for meritorious service would be "allocated in accordance with the provisions of the charter."

In the absence of a valid rule or regulation prescribing a different date the reasonable implication to be drawn from provisions of the charter is that the cutting off for the application of meritorious service credits should be not earlier than the date the examination is held.

The judgment is reversed.

GIBSON, C. J. and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

34 Cal.2d 726

PACIFIC INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 21102.

Supreme Court of California, in Bank.

Feb. 17, 1950.

Petition by the Pacific Indemnity Company to review an order of the Industrial Accident Commission of the State of California awarding compensation for injury to C. J. Rotondo.

The Supreme Court, Carter, J., held that evidence sustained Commission's finding that reactivation of claimant's pre-existing pulmonary tuberculosis was caused by his work as a flight instructor and arose out of and in course of his employment and that employer failed to sustain burden of showing that claim was barred by six-month statute of limitations.

Award affirmed.

Prior opinion 205 P.2d 742.

1. Workmen's compensation ⚷1549

In compensation proceeding, evidence sustained finding that reactivation of claimant's pre-existing pulmonary tuberculosis was caused by his work as a flight instructor and arose out of and in course of his employment. Labor Code § 5405.

2. Workmen's compensation ⚷1207

Six-month limitation provision of Compensation Act does not commence to run until employee's condition, whether from disease or injury, culminates in incapacity to work and employee knows, or in exercise of ordinary care should have known, that he was suffering from the disease or injury and that such disease or injury was caused by his employment. Labor Code, § 5405.

3. Administrative law and procedure ⚷784
Workmen's compensation ⚷1380, 1939

Whether, in the exercise of ordinary care, an employee should have known or knew that he was suffering from a disease or injury and that such disease or injury was caused by his employment is a question of fact to be determined by compensation commission, and burden of proving employee had or should have had such knowledge rests on employer or his insurance carrier. Labor Code, § 5405.

4. Workmen's compensation ⚷1682

Where in compensation proceeding employee testified that he first discovered on November 16, 1944, that his disease had become reactivated, and there was no direct evidence whatever that prior to that date he knew he had a compensable condition, and no physician advised him that his ailment was employment connected, employee's testimony was sufficient to prove that he did not know prior to that date that his disease had become reactivated. Labor Code, § 5405.

5. Workmen's compensation ⚷1682

In compensation proceeding, evidence sustained commission's finding that insurance carrier failed to prove that employee's claim was barred by six-month statute of limitation. Labor Code § 5405.

Herlihy & Herlihy and J. McLaughlin, Los Angeles, for petitioner.

T. Groezinger and Robert Ball, San Francisco, for respondents.

CARTER, Justice.

This is a review of an award of workmen's compensation to C. J. Rotondo based upon a finding that he suffered a disability consisting of aggravation of pre-existing pulmonary tuberculosis. Petitioner asserts (1) that the evidence does not support the finding that the disability arose out of and occurred in the course of Rotondo's employment, and (2) that the claim was barred by the statute of limitation. Labor Code, sec. 5405, application must be filed within 6 months after injury.

In 1941, Rotondo was employed by Cal-Aero Academy, as a flight instructor. The employer was training pilots for the Army Air Corps. In 1942, Rotondo, while flying, developed symptoms of pulmonary tuberculosis, consisting of a hemorrhage. He was advised by his employer that his disability was not compensable. He was then treated in a hospital for about four months, followed by resting at home. In January, 1943, the employer requested him to return to work with the assurance that he would be assigned to radio communication duty in the control tower—light inside work. He was cleared by his physician for such work, but after two weeks in that capacity, the employer assigned him to flight instructor duties. A physician's report in May, 1943, showed the pre-existing disease to be arrested. As flight instructor, Rotonda was in the air six days a week, working from four to nine hours a day and sometimes longer. In this work he was subjected to the resultant changes in barometric pressure and temperature. Most of those flying suffered from colds more or less continuously from the temperature changes. In February of 1944, while "rocking" the wing of an aircraft (a process by which the wing is manually lifted up and down to assist in freeing a wheel bogged in the sand), he felt "catches" in his chest and later expectorated blood. In May, 1944, while cranking a plane, he had a similar experience. In July, 1944, feeling tired, he left work and stayed at home to rest. On November 16, 1944, his former physician, Dr. Pottenger, examined him and advised him that the tubercular condition had been reactivated. He filed his claim with the commission on February 9, 1945.

[1] The evidence is ample to support the finding that the reactivation of his condition was caused by his work—arose out of and occurred in the course of his employment. Dr. Pottenger testified that if all Rotondo had to do was sit in the control tower, his condition would not have been reactivated; that hemorrhages were caused by changes in weather—changes in barometric pressure; that flying under the conditions prevailing in Rotondo's case was "just the thing" that would start reactivating the tubercular condition; that rocking and cranking the plane could cause a hemorrhage. The sum and substance of his testimony is that Rotondo's work as a flying instructor was the cause of the lighting up of his previous disease. There is evidence that any work or activity would aggravate the condition and that there was no particular connection between Rotondo's work and the disability. This presents nothing more than a conflict in the evidence which has been resolved against petitioner.

Hartford Accident & Indemnity Co. v. Industrial Acc. Comm., 140 Cal.App. 482, 483, 35 P.2d 366, and California Casualty Indemnity Exchange v. Industrial Acc. Comm., 76 Cal.App.2d 836, 174 P.2d 680, relied upon by petitioner are not controlling for the conflict in the evidence here existing was not present in those cases. On the contrary, the cases support the view that there was sufficient evidence here to support the award. See, Liberty Mutual Insurance Co. v. Industrial Acc. Comm., 73 Cal.App.2d 555, 166 P.2d 908; Lumbermen's Mutual Casualty Co. v. Industrial Acc. Comm., 29 Cal.2d 492, 175 P.2d 823; Mullane v. Industrial Acc. Comm., 118 Cal. App. 283, 5 P.2d 483.

[2, 3] On the issue of the statute of limitation, petitioner asserts that Rotondo knew or should have known more than six months prior to February 9, 1945, when he filed his application for compensation, that his disease had been reactivated and that it was compensable. It is settled that the statute does not commence to run until the employee's condition, whether from disease or injury, culminates in incapacity to work and the employee knows, or in the exercise of ordinary care should know, that he is suffering from the disease or injury and that such disease or injury was caused by his employment, Pullman Co. v. Industrial Acc. Comm., 28 Cal.2d 379, 170 P.2d 10; Alford v. Industrial Accident Comm., 28 Cal.2d 198, 169 P.2d 641; Huysman v. Kirsch, 6 Cal.2d 302, 312, 57 P.2d 908; Faith v. Erhart, 52 Cal.App.2d 228, 126 P.2d 151; Marsh v. Industrial Acc. Comm., 217 Cal. 338, 18 P.2d 933, 86 A.L.R. 563, and those issues present questions of fact to be determined by the commission. Alford v. Industrial Accident Comm., supra; Marsh v. Industrial Acc. Comm., supra. The burden of proving that the employee has or should have had such knowledge rests on the employer or his insurance carrier. Associated Indemnity Corp. v. Industrial Acc. Comm., 71 Cal.App.2d 820, 163 P.2d 771; Argonaut Mining Co. v. Industrial Acc. Comm., 21 Cal.App.2d 492, 70 P.2d 216. Specific applications of the rule show that merely because the employee had some symptoms is insufficient to sustain the burden (Argonaut Mining Co. v. Industrial Acc. Comm., supra); that the employee is not required to be versed in medical knowledge, Associated Indemnity Corp. v. Industrial Acc. Comm., supra; Marsh v. Industrial Acc. Comm., supra, and thus, that it is not fatal that he made a mistaken diagnosis of his trouble. Price v. Industrial Acc. Comm., 9 Cal.App.2d 213, 49 P.2d 294.

[4, 5] Rotondo testified that he first discovered on November 16, 1944, that his disease had become reactivated. There is no direct evidence whatever that prior to that date he knew he had a compensable condition—that his condition was caused by his employment. No physician ever advised him that his ailment was employment con-

nected. His testimony that he first learned the above stated facts on November 16, 1944, is, standing alone, sufficient to prove that he did not know. See, Western Pac. R. Co. v. Industrial Acc. Comm., 17 Cal. App.2d 119, 61 P.2d 459; Employers' Liability Assur. Corp., Ltd., of London, England v. Industrial Acc. Comm., 42 Cal.App.2d 669, 109 P.2d 716. Hence the only question is whether he should have known, and on that issue the commission was justified in concluding that petitioner failed to sustain its burden, particularly, when we remember that it is a question of fact. When Rotondo became ill with tuberculosis in the first instance (1942), his doctor did not advise him that it was caused by flying—his work. He inquired of his employer, through his wife, as to whether the original attack was compensable and was advised it was not. Although the fact that he inquired may have indicated that he thought he might be entitled to compensation, such thought was banished by his employer. When he returned to work in January, 1943, he was not especially warned by his doctor against flying. The only physician who mentioned flying to him as the cause of his illness was Dr. Titus who suggested, following the 1942 attack, that he not do night flying. He was informed by his physician after he had returned to flying in 1943 that it was "all right" for him to go ahead with his "old work", and later he was advised by a doctor that the disease was arrested and he could carry on his usual work. It is true that he had hemorrhages, became tired and quit work, and was told that he had a cavity in July, 1943, yet it can not be said as a matter of law that he should have then known that he had a compensable disease—reactivation of his former condition caused by his employment. Thus, since Rotondo did not know that his first attack (1942) of the disease was due to his employment (only one doctor mentioned flying as a cause); that his employer had informed him then that he was not entitled to compensation; and his doctors had not particularly warned him against flying—some of them having told him he could return to his "old work", the commission was justified in concluding that petitioner had not sustained the burden of proving the claim barred by the statute of limitation.

The award is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

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96 Cal.App.2d 86

GLENN v. CITY OF LOS ANGELES et al.

Civ. 17080.

District Court of Appeal, Second District,
Division 1, California.

Feb. 16, 1950.

Rehearing Denied March 6, 1950.

Hearing Denied April 13, 1950.

Action by Marcella B. Glenn against the City of Los Angeles, a municipal corporation, and others for injuries sustained by plaintiff when struck by automobile of the city driven by a police officer after it had collided with another automobile.

From a judgment of the Superior Court of Los Angeles County, Henry M. Willis, J., the City of Los Angeles appealed.

The District Court of Appeal, held that the filing of a claim against the city for the injuries within six months of the happening of the accident as required by the city charter was sufficient, and that evidence of occupant of the other automobile was admissible to establish that the proximate cause of the accident was the negligence of the officer.

Judgment affirmed.

1. Automobiles ⇨230

A claim against city for injuries sustained by pedestrian when struck by an automobile of the city was sufficient, where it was presented within six months thereof as required by the city charter.

2. Municipal corporations ⇨741(1)

The statute respecting time for filing of claims for negligence of a public employee has no application in an action against a municipality. Government Code, § 1981.

3. Automobiles ⟹243(16)

In action against city for injuries sustained by pedestrian when struck by automobile of city driven by a police officer which was out of control allegedly due to a previous collision, testimony of occupant of other automobile to extent that it proved the proximate cause of the accident was the negligence of the officer, was admissible against the city.

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Ray L. Chesebro, City Attorney, Bourke Jones, Assistant City Attorney, Edwin F. Shinn and Alan G. Campbell, Deputy City Attorneys, Los Angeles, for appellant.

Charles E. Beardsley, Los Angeles, Montgomery G. Rice, Los Angeles, of counsel, for respondent.

DRAPEAU, Justice.

Plaintiff and her sister were crossing the intersection of Sixth Street and Manhattan Place in Los Angeles. They were walking from north to south on the easterly crosswalk of the intersection, plaintiff on the right of her sister. It was daylight of a summer's evening, and the pavements were dry.

As the two ladies reached the curb on the south side of Sixth Street and one of them stepped up onto the curb, they were struck by a wildly careening automobile. This automobile was on fire; it continued into a building across the sidewalk, and set it on fire, too.

The plaintiff was seriously injured. She was hospitalized and at home in bed for approximately five months. And she lost that time, and more, from her work.

The intersection in question was "protected" by stop signs in Manhattan Place on the north and south sides of Sixth Street.

The automobile which struck the plaintiff was the property of the City of Los Angeles and was driven by Mr. Earl Rombeau, a police officer employed by the City, and at the time engaged in his duties as such.

Up to this point there is no conflict in the testimony and no argument as to the truth of the facts recited.

Mr. Rombeau testified that he had been driving easterly along Sixth Street. Approaching the intersection he saw no cars coming north or south on Manhattan Place. When he was halfway through the intersection the left front end of his car was struck with terrific force by an automobile going south on Manhattan Place.

The manager of a store near the intersection had just closed up and was standing on the sidewalk at the intersection. He testified, corroborating the officer's testimony; and, further, that the car which struck the city car was going thirty-five to forty miles an hour, went right past the boulevard stop without slackening its speed, and ran into the city car.

The defendant, Mr. Alfred J. Barber, the driver of the car coming south on Manhattan Place, testified that he was going slowly; that he made the boulevard stop as he should have made it, and then proceeded in low gear out into the intersection; that when he was past the center of the intersection his car was struck by the city car; that the city car had been coming toward him at a speed of fifty miles an hour. This testimony was corroborated by a friend of Mr. Barber, who was riding with him in the front seat.

The case against the defendant Rombeau was dismissed, because he had not been served with the claim required by Section 1981 of the Government Code. This left Mr. Barber and the City of Los Angeles as defendants. The issues were presented to a jury, which found for the plaintiff, the injured lady, and against both Mr. Barber and the City, and fixed her damages at $4,000. Judgment followed, from which the City appeals.

The City proposes two grounds for reversal of the judgment:

First: That a claim was not presented to the City within ninety days from the date of the accident, as required by Government Code, sec. 1981. (Section 376 of the municipal charter requires that a claim be filed within six months of the happening of the accident. Plaintiff's claim was filed within that time.)

Secondly: That the trial court erred in overruling objections to testimony.

[1, 2] The first proposition is now settled adversely to the City's contention. Government Code, sec. 1981, has no application in an action against a municipality. Tyree v. City of Los Angeles, 92 Cal.App.2d 182, 206 P.2d 912; Saldana v. City of Los Angeles, 92 Cal.App.2d 214, 206 P.2d 866. In both cases hearings in the Supreme Court were denied.

[3] The second proposition involves the testimony of the defendant Barber, and his corroborating witness, as already narrated. The defendant City objected to this testimony, and the objection was overruled. This evidence in support of the issues in the defendant Barber's case was clearly admissible; and to the extent that it proved the proximate cause of the accident to have been the negligence of Mr. Rombeau, it was admissible against the City.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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96 Cal.App.2d 70

In re GROBE'S ESTATE.

JENKS v. GROBE et al.

Civ. 17378.

District Court of Appeal, Second District, Division 2, California.
Feb. 14, 1950.

Rehearing Denied March 1, 1950.
Hearing Denied April 13, 1950.

Proceeding by Irene Johannsen Jenks in the matter of the estate of Edward J. Grobe, deceased, for the probate of a will opposed by Nellie R. Grobe and others, contestants.

The Superior Court, Los Angeles County, Caryl M. Sheldon, J., entered a judgment admitting the will to probate and the contestants appealed.

The District Court of Appeal, McComb, J., held that the evidence sustained the trial court's finding that deceased did not intend to revoke his prior will by a holographic letter written and sent to his attorney several years previous to his death.

Judgment affirmed.

1. Appeal and error 🔑989

When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, power of appellate court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact.

2. Wills 🔑306

In proceeding for admission to probate of deceased's will, evidence sustained trial court's finding that deceased did not intend to revoke will by holographic letter written by him and sent to his attorney several years previous to his death wherein deceased stated that he wished to annul his will and have attorney draw up another will.

Arthur A. Jones, Los Angeles, for petioner and respondent.

Russell H. Pray, Long Beach, William C. Price, Long Beach, for contestants and appellants.

McCOMB, Justice.

From a judgment admitting a will to probate after trial before the court without a jury, contestants appeal.

Facts: February 16, 1943, Edward J. Grobe duly executed a witnessed will by the terms of which Mrs. Irene Johannsen Jenks was named as beneficiary. This will was prepared at Mr. Grobe's request by attorney Howard E. Hurd. On or about July 25, 1945, Mr. Grobe wrote attorney Hurd a letter, the original of which was sent to Mr. Hurd's office and a copy to his home. This letter read as follows:

"1838 Vassar Ave.
Glendale, Calif.
July 25, 1945

"Mr. Howard E. Hurd, Atty
305 No. Maple Dr.
Beverly Hills, Calif.

"Dear Howard I wish to annul the Will you made for me, in which the beneficiary is Mrs. Irene Johannsen Jenks of 1830 Vassar Ave., Glendale.

"I wish to have you draw up another Will in which I want the name of my niece, Miss Ada Sommer of 14564 Addison St., Van Nuys, Calif., *is* the beneficiary. Would like to meet you at your home sometime soon if it would be convenient for you.

"Yours cordially,
"E. J. Grobe"

The foregoing letter in its entirety was in the handwriting of Mr. Grobe. After writing and mailing the letter, Mr. Grobe did not press the matter further and did not make any other will. He died on April 9, 1948.

The trial court found that it was not the intent of decedent by the foregoing letter of July 25, 1945 to revoke the will which he had previously made.

Question: Was there substantial evidence to sustain the trial court's finding that it was not the intent of decedent to revoke his prior will by the holographic letter he wrote and sent to Mr. Hurd on July 25, 1945?

[1] This question must be answered in the affirmative. When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with a determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact. (In re Estate of Isenberg, 63 Cal.App.2d 214, 217, 146 P.2d 424.)

[2] Applying this rule to the facts of the present case the only evidence received as to the revocation of decedent's witnessed will was the letter of July 25, 1945, set forth above, and the testimony of Mr. Hurd that subsequent to the writing of such letter decedent had never pressed the matter of drawing another will, nor had he done so even though Mr. Hurd had explained to him that he might do so by drawing a holographic will. He also testified that he had explained to decedent how to draw such a will. Clearly the letter of July 25, 1945, is susceptible of the inference that decedent wished to change the beneficiary in his will by having another will drawn naming a different beneficiary, and that at such time the will which he had previously executed on February 16, 1943, would be null and void. This evidence, coupled with the fact that decedent lived for several years after he wrote the letter of July 25, 1945, without executing a new will, witnessed or holographic, constitutes sumstantial evidence to sustain the trial court's finding that decedent did not have the intent of revoking his will by or at the time he wrote the letter aforementioned.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

96 Cal.App.2d 19

HEINLEIN v. ANAHEIM UNION HIGH SCHOOL DIST. et al.

Civ. 4116.

District Court of Appeal, Fourth District, California.

Feb. 8, 1950.

Rehearing Denied Feb. 28, 1950.

Hearing Denied March 30, 1950.

Mary P. Heinlein filed petition against the Anaheim Union High School District and others, for a writ of mandate in which it was sought to compel trustees of the school district to recognize petitioner as a "satisfactory employee" and pay her the salary fixed for such an employee.

A judgment denying the petition was entered in the Superior Court of Orange County, Robert Gardner, J., and the petitioner appealed.

The District Court of Appeal, Mussell, J., held that evidence supported finding that action of school board in denying petitioner salary increases pursuant to recommendation of administrative committee that petitioner was an unsatisfactory employee was neither arbitrary, capricious nor discriminatory, nor an attempt to evade provisions of the Tenure Act.

Judgment affirmed.

1. Schools and school districts ⚿144(4)

A city or county board of education may exercise its discretion in adopting permanent teachers' salary schedules, but such schedules must be adopted before beginning of school year, allowances based on years of training and experience must be uniform and subject to reasonable classifications, and schedules must not be arbitrary, discriminatory or unreasonable. Education Code, §§ 13801–13807, 13802.

2. Schools and school districts ⚿144(4)

School board could offer evidence of incompetency or inefficiency of a dissatisfied lower salaried teacher in justification for discrepancy between dissatisfied teacher's salary and salaries of other teachers of same years of experience and service. Education Code, §§ 13801–13807, 13802.

3. Schools and school districts ⚿144(4)

Evidence supported finding that action of school board in denying petitioner salary increases for school years 1947–48 and 1948–49 pursuant to recommendation of administrative committee that petitioner was an unsatisfactory employee was neither arbitrary, capricious nor discriminatory, and was not an attempt to evade Tenure Act. Education Code, §§ 13521–13559, 13801–13807, 13802.

4. Schools and school districts ⚿144(4)

The difference between efficient and inefficient teachers affords a valid and reasonable basis for classifying tenure teachers for salary purposes, and school board's action in such respect is conclusive upon the courts. Education Code, §§ 13521–13559, 13801–13807, 13802; U.S.C.A.Const. Amend. 14.

5. Constitutional law ⚿102(1)

Although tenure is conferred by statute so that once status is acquired, a teacher may not be dismissed except for cause upon notice and hearing, tenure does not carry with it a vested right to a particular salary. Education Code, §§ 13521–13559, 13801–13807, 13802; U.S.C.A.Const. Amend. 14.

6. Constitutional law ⚿277(2)
Schools and school districts ⚿144(4)

The statute vesting in school board the power to fix compensation of teachers contains no requirement for notice and hearing nor does due process of law clause of 14th Amendment require notice and hearing as a condition precedent to fixing of a teacher's compensation. Education Code, §§ 13801–13807, 13802; U.S.C.A. Const. Amend. 14.

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Forgy, Reinhaus & Forgy, Santa Ana, Clark Miller, Santa Ana, for appellant.

Joel E. Ogle, County Counsel, George F. Holden, Deputy Counsel and Stephen K. Tamura, Deputy County Counsel, Santa Ana, for respondents.

MUSSELL, Justice.

This is an appeal from a judgment denying a petition for a writ of mandate in which it was sought to compel the trustees of the Anaheim Union High School District to recognize petitioner as a "satisfactory employee" and to pay her the salary fixed for such an employee.

It was alleged that during the school years of 1947–48 and 1948–49 the Anaheim Union High School, acting through the superintendent of schools, Paul H. Demaree, classified the petitioner as an unsatisfactory teacher; that said rating was discriminatory, arbitrary and unreasonable and that it prevented the petitioner from having annual increases in increment of salary; that the method of fixing petitioner's salary was an unlawful classification of petitioner and an attempt to evade the Tenure Act, Education Code, secs. 13521–13559, and the statutory provisions relating to the fixing of compensation for certificated employees, Ed.Code, secs. 13801–13807, and that petitioner lost her annual increase in salary by reason of such classification.

The respondents, in their answer, admitted finding petitioner unsatisfactory for each of the school years in question but denied that the action of the trustees was arbitrary, discriminatory or unreasonable or that it was accomplished with the intent or purpose of evading the provisions of the Education Code.

A trial was had on the issues thus framed and findings of fact and conclusions of law favorable to the respondents were adopted.

Petitioner was employed as a teacher in the Anaheim Union High School since 1924. She formerly taught english, but since the school year 1943–44 was gradually transferred to study hall. For the school year 1946–47 petitioner received a salary of $3,250 in accordance with the schedule for that year, which provided a maximum basic salary of $3,050 for teachers with fourteen or more years of experience and an additional sum of $200 for general secondary credentials. Salaries for that year were based wholly upon years of experience and training.

In fixing salaries for the school year 1947–48, the respondent board of trustees for the first time adopted a policy of denying salary increases to teachers found to be unsatisfactory. Teachers found to be unsatisfactory received the same salary as adopted for them for the previous year, whereas teachers found to be satisfactory received an increment of approximately $800. The same policy was continued for the school year 1948–49 and the schedule adopted for that year again provided that no increment would be granted teachers found to be unsatisfactory. Petitioner was found to be unsatisfactory for each of the school years 1947–48 and 1948–49 and her salary for those years remained at $3,250 per year.

In determining whether or not a teacher was satisfactory, the board of trustees followed the recommendations of an administrative committee, the members of which were Mr. Demaree, the principal of the high school, two vice-principals, and the head of the department in which the teacher taught. This committee, which met in the month of May immediately preceding the commencement of each school year, recommended to the board that petitioner be found unsatisfactory for the respective school years in controversy. The committee evaluated the teacher's teaching effectiveness and educational worth by measuring her actual classroom performances against a number of factors, including personality, skill as an instructor, scholarship, ability to discipline, character building, professional growth, professional loyalty, community interests and standing, power of expression oral and written, influence on pupils, tact and sympathy, initiative, persistence, energy, personal appearance and culture and refinement.

Mr. Demaree testified that these standards are used by the California Teachers' Association in recommending teachers for employment. There was testimony by the members of the committee that they had from time to time during the year personally observed the petitioner's classroom performances and determined that appellant was not a satisfactory teacher from personal observation as well as information received from students in classes taught by petitioner.

Mr. Demaree presented the committee's recommendation to the board of trustees and discussed with them the various factors relating to petitioner's teaching effectiveness which had been considered by the committee. No formal hearings were had and no testimony taken, nor were there any written records or affidavits presented. The petitioner was not present at either of the meetings and was given no notice or opportunity to be heard.

Petitioner contends that the board of trustees violated the constitutional guarantees against unfair discrimination and did not follow the principal of uniformity in fixing salaries; that the procedural requirements of the Fourteenth Amendment to the constitution were not followed and that in any classification system whereby one teacher is paid more than another, it is necessary that there be some objective standard by which the different teachers are rated.

Section 13802 of the Education Code provides that the governing body of any school district shall fix and order paid the compensation of persons in public school service. This section is based on former School Code section 5.731.

[1] In Rible v. Hughes, 24 Cal.2d 437, at page 443, 150 P.2d 455, at page 458, 154 A.L.R. 137, the court, in considering the interpretation that had been placed upon the provisions of the section in Kacsur v. Board of Trustees, 18 Cal.2d 586, 116 P.2d 593; Fry v. Board of Education, 17 Cal.2d 753, 112 P.2d 229; Abraham v. Sims, 2 Cal.2d 698, 42 P.2d 1029 and Fidler v. Board of Trustees, 112 Cal.App. 296, 296 P. 912, said, 24 Cal.2d at page 444, 150 P.2d at page 458: "According to these decisions, then, a board of education may exercise its discretion in adopting salary schedules fixing the compensation to be paid to permanent teachers although (1) the schedule must be adopted prior to the beginning of the school year; (2) any allowance based upon years of training and experience must be uniform, and subject to reasonable classification; and (3) the schedule must not be arbitrary, discriminatory or unreasonable."

The principal question for determination in the instant case is whether the action of the school board in denying petitioner a salary increase for the school years in controversy was, under the circumstances presented, a reasonable exercise of its power to fix teachers' compensation and whether a board of trustees of a school district may lawfully increase the salary of an efficient teacher while permitting the salary of an inefficient teacher of like training and experience to remain unchanged.

[2] As was said in Kacsur v. Board of Trustees, supra, 18 Cal.2d at page 594, 116 P.2d at page 597: "It is quite possible that a situation might exist in which one of two teachers of similar experience and service might be not only more capable, but also more industrious and willing than the other, who although sufficiently competent to prohibit dismissal, might be somewhat indolent and non-cooperative. In such a situation the school board should be permitted to exercise its reasonable discretion in raising the salary of the industrious teacher as a reward for her good work without at the same time having to increase the salary of the undeserving teacher."

It was also held that in an action instituted by a dissatisfied lower salaried teacher, the board could introduce evidence to justify its action. Otherwise, all discretion would be taken from it.

At the trial of the instant action several witnesses testified as to petitioner's conduct as a teacher. Mr. Walsworth, a witness called by petitioner, testified that he was a member of the board of trustees and was present at the meeting in May of 1947, when petitioner was rated as unsatisfactory. He stated that he had two boys and a girl in petitioner's study hall class and that one of the boys and the girl, as well as other students and parents, had complained about the petitioner, and that her work in the study hall was not satisfactory.

Mr. James A. Baker, a witness also called by petitioner, stated that he was a member of the board of trustees and was present at the meeting in 1947 at which it was recommended that petitioner be rated unsatisfactory; that he had talked to students taught by petitioner and was informed by them that they did not learn much under her instruction and that the classroom was not conducted properly as far as discipline was concerned.

Mr. Demaree testified that he was principal of the school and that petitioner had a negative personalty, was weak as an instructor, could not control the class and showed no improvement in her teaching ability; that her community interest and standing were poor; that the pupils were not interested; that there was no understanding between pupil and teacher in most cases and that petitioner was entirely lacking in initiative; that through the public address system throughout the building he listened upon several occasions to the progress of the class in petitioner's room and heard a "very monotonous, routine classroom discussion, without life or interest".

Ethel Caverly, head of the English department of the school since 1938, testified that she had observed petitioner's conduct in the classes in English and felt that petitioner was lacking in tact and understanding of the individual pupil; that her classroom procedure was done in a rather "cut and dried manner"; that the students were inattentive and that she requested petitioner's transfer from the English department.

Lois Whitington testified that she was a vice-principal of the high school, was acquainted with the petitioner, and from the years 1938 to 1941 visited her classes three or four times a year and had observed that petitioner's skill as an instructor was weak; that her personality was not forceful; that it was negative; that the children were not particularly interested in the class; that it was conducted in a monotonous way; that when the petitioner talked to the pupils she never looked at the class; she always looked at the floor; that the manner of recitation was very mechanical; that petitioner asked questions and the students answered the questions that she asked and that there was no development of any particular subject; that there were numbers of requests for changes of schedule from petitioner's class to those of other teachers, not only by the pupils but also by their parents and that this was continuous during the time the witness was vice-principal and until petitioner was taken out of the English department in 1946.

Frank Kellogg, vice-principal of the school, testified that he visited petitioner's classes and observed that she usually had a plan of procedure in her classroom that she seemed to carry out rather methodically; that she was not too alert to the responsiveness of the group at the time she was teaching; that he considered petitioner unsatisfactory and the basis of his opinion was personal observation plus what he had found out from talking to pupils and parents.

[3] We conclude that there was substantial evidence to support the trial court's finding: "That petitioner was, at the time of fixing salaries and employment of teachers for each of the school years 1947–1948 and 1948–1949, an unsatisfactory teacher, and that the action of the board of trustees in denying petitioner salary increases for the school years 1947–48 and 1948–49 was neither arbitrary, capricious nor discriminatory."

We also conclude that under the circumstances here shown the finding of the trial court that the action of the board in determining petitioner to be unsatisfactory and leaving her salary unchanged was not an attempt to evade the provisions of the Education Code.

The determination of the school board in the instant action that the salaries of teachers should be fixed for the years in question in accordance with the standard of satisfactoriness seems to us to be a reasonable one and therefore conclusive upon the court, and that the schedules are not discriminatory in their application to the petitioner as there was no reduction of the salary of teachers found to be unsatisfactory and teachers in such a class were all affected equally. Rible v. Hughes, supra. There was no evidence introduced at the trial indicating that the policy of denying increments to unsatisfactory teachers was discriminatorily applied to her in that she was singled out among all the teachers for particular or arbitrary action.

[4-6] Petitioner's contention that the board of trustees violated the constitutional guarantees against unfair discrimination and did not follow the principal of uniformity in fixing salaries is without merit as the difference between efficient and inefficient teachers affords a valid and reasonable basis for classifying tenure teachers for salary purposes and the board's action in this respect is conclusive upon the courts. Rible v. Hughes, supra, 24 Cal.2d at page 445, 150 P.2d at page 459, 154 A.L.R. 137; County of Los Angeles v. Southern Cal. Tel. Co., 32 Cal.2d 378, 389, 196 P.2d 773. Although tenure is conferred by statute so that once status is acquired, a teacher may not be dismissed except for cause upon notice and hearing, Secs. 13521–13559, Ed.Code., tenure does not carry with it a vested right to a particular salary. Fidler v. Board of Trus-

tees, supra; Abraham v. Sims, supra; Butterworth v. Boyd, 12 Cal.2d 140, 152, 82 P.2d 434, 126 A.L.R. 838; Kacsur v. Board of Trustees, supra, 18 Cal.2d at page 591, 116 P.2d at page 595. Section 13802 of the Education Code vesting in the board of trustees the power to fix compensation of teachers contains no requirement for notice and hearing nor does the due process clause of the 14th Amendment require notice and hearing as a condition precedent to the fixing of a teacher's compensation. We find no statutory requirement that there be some objective standard by which different teachers are rated.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

96 Cal.App.2d 134

SALES AFFILIATES, Inc. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 17460.

District Court of Appeal, Second District, Division 3, California.

Feb. 17, 1950.

The Sales Affiliates, Inc., filed a petition for writ of prohibition against the Superior Court of the State of California, in and for the County of Los Angeles, to command the Superior Court to cease proceedings against petitioner in an action for damages in which petitioner and certain others were named as defendants.

The District Court of Appeal, Shinn, P. J., held that petitioner was "doing business" in state, so as to be amenable to civil process.

Peremptory writ denied.

1. Corporations 🔑642(4½)

If representation which foreign corporation maintained in state gives it in a practical sense, and to a substantial degree, the benefits and advantages it would have enjoyed by operating through its own office or paid sales force, foreign corporation was "doing business" in state so as to be amenable to civil process. Code Civ.Proc. § 411.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Doing Business".

2. Corporations 🔑642(4½)

A foreign beauty supply corporation, which used salesmen of jobbers and wholesalers to whom it sold beauty products to solicit beauty operators in state for licensing agreements to use patents covering certain permanent waving processes owned by corporation, was "doing business" in state, so as to be amenable to civil process. Code Civ.Proc. § 411.

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Reed and Kirtland, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

SHINN, Presiding Justice.

Sales Affiliates, Inc., a New York corporation, petitions for a writ commanding the cessation of proceedings against it in an action for damages in which petitioner and certain others were named as defendants. Plaintiffs in the action, Cheryle and George Gorciak, claim to have sustained personal injuries from the use of a preparation distributed and sold by petitioner and used in giving permanent waves. Process was served upon the Secretary of State and a copy was delivered to petitioner at its New York office. Petitioner appeared specially and made a motion to quash service of summons upon the ground it was not, and had not been, doing business in the state of California, and that the attempted service was therefore a nullity. The motion was denied.

It is represented by the petition and supporting affidavits that petitioner purchases beauty products and sells the same to beauty supply jobbers and chain and department stores throughout the United States, one of its jobbers being Biltmore Beauty Supply Company, one of defendants in the damage action; that Biltmore Company sends orders for goods to petitioner in New York which are accepted there, following which the products are shipped to Biltmore Company in California from petitioner's warehouse in Waterloo, New York; that the goods are paid for in New York. It is alleged that Cheryle Gorciak entered into a written agreement under which she was licensed to use certain of petitioner's patented methods of putting permanent waves in human hair. The licensee paid $5 upon signing the agreement, and agreed to pay $5 per year to keep the license in force, and not to charge customers less than the prices stipulated by petitioner. The agreement was signed by Mrs. Gorciak, doing business as Cheryle's Beauty Shop, by Biltmore Beauty Supply ("Zotos, jobber"), by Al Bronson ("Zotos jobber salesman"), and was sent to New York, where it was signed by petitioner's secretary, and a copy returned to Mrs. Gorciak. It is alleged that petitioner's jobber at Los Angeles, Biltmore Beauty Supply Company, is not its agent, but instead is a customer; that petitioner has one representative for eleven of the western states who solicits orders for merchandise from jobbers and wholesalers but not from retail purchasers, forwards the orders to petitioner in New York State, whence the goods are shipped to the customers. It is alleged that petitioner has never qualified to do business in the State of California, has no officer or agent here for the purpose of accepting service of process, or any other purpose, except its said sales representative, keeps no stock of goods in California, and that all accounts are paid through its New York office. The Biltmore Company, through its salesman, Al Bronson, procured Mrs. Gorciak as a customer and furnished her with the agreement above mentioned.

[1] Our decision as to whether petitioner was shown to have been doing business in California is simplified by the absence of conflict in the evidence as to the material facts. In the comparatively recent cases of Thew Shovel Co. v. Superior Court, 35 Cal.App.2d 183, 95 P.2d 149, and West Publishing Co. v. Superior Court, 20 Cal.2d 720, 128 P.2d 777, there will be found a full discussion of the factors which determine whether a foreign corporation is doing business in the state, as well as a consideration of leading federal and state cases. There is no need for us to indulge in a repetitious analysis of the authorities. Every factual situation where the question arises calls for a comparison of the business advantages derived from the methods employed by the corporation, with those it would enjoy if it conducted its business through its own offices or paid agents in the state. If the representation which petitioner maintained in the state gave it in a practical sense, and to a substantial degree, the benefits and advantages it would have enjoyed by operating through its own office or paid sales force, it was clearly doing business in the state so as to be amenable to civil process.

[2] Our inquiry is whether petitioner's plan of transacting business through its jobbers gave it opportunities for regular contact with its customers and a channel for a continuous flow of business into the state. As already noted, petitioner had one salesman who covered eleven states taking orders from wholesalers and jobbers, but not from retailers. If the activities had ended there we would have an entirely different question. But petitioner's methods went far beyond mere selling at wholesale. It uses a printed form for its licensing agreements. The agreement recites that petitioner is the owner of patents covering certain permanent waving processes, the use of which is licensed to the operator. The latter agrees to charge minimum prices fixed by the licensor, and also agrees not to use any product which infringes any of the licensor's patents, and to pay an annual license fee of $5. The form is designed for the signature of petitioner by one of its officers, the signature of the beauty shop operator, the signature of petitioner's and of the jobber's salesman, although the jobber is not a party to the agreement. Prospects for licensing agreements are contacted by the jobber's salesmen; the agreements are completed except for the signature of petitioner, and are forwarded to petitioner by the jobber, and it may be inferred that a license fee of $5 is forwarded with the agreement,

since the first fee is payable when the agreement is signed. Through its jobbers petitioner builds up a clientele of retail consumers for certain of its products, as an integral part of its business. The wholesalers and jobbers are unquestionably independent contractors, and in no sense employees, with respect to the purchase and resale of petitioner's products. But with respect to the solicitation of operators to enter into licensing agreements with petitioner the jobbers clearly act as agents of petitioner. Moreover, it appears that this branch of petitioner's business is promoted exclusively through the jobbers and that the latter may be contacted as petitioner's agents by operators who wish to become licensees. It must be assumed that the jobbers furnish an adequate and satisfactory medium for the marketing of petitioner's products to a particular class of customers and upon terms and conditions which are advantageous to petitioner. Aside from the license fees collected, the arrangement with the licensees tends to maintain a steady outlet for certain products and it may be inferred that petitioner derives some benefit in the way of protection of its patents through the agreement of its licensees not to use infringing products. Petitioner's methods, so far as the licensing branch of its business is concerned, would appear to give it substantially the same commercial advantages that would be available to it through an office or a force of employees maintained in the state devoted exclusively to this phase of its business. This is a conclusive answer to petitioner's claim that it was not doing business in California. In 35 Cal.App.2d, at page 187, 95 P.2d at page 152, supra, the court followed a summation of the factual situation under review with this succinct statement: "The manufacturer thus received the attention of its duly recognized representative and such consequent financial gain from the actual sale of its wares and products as if it had conducted an office under its own name in this state." When, upon analysis, the facts in evidence clearly lead to this conclusion there is no more to be said. The trial court therefore did not err in holding that petitioner was doing business in the state within the meaning of section 411, Code of Civil Procedure.

The preliminary writ is dissolved and a peremptory writ is denied.

WOOD and VALLÉE, JJ., concur.

96 Cal.App.2d 9

MURFEE v. PORTER et al.

Civ. 14154.

District Court of Appeal, First District, Division 1, California.

Feb. 8, 1950.

Hearing Denied March 30, 1950.

Action by Emerson Murfee, lessee, against A. L. Porter and Henry Doelger, lessors, to recover excess of money paid under an option to purchase realty.

The Superior Court of San Mateo County, A. R. Cotton, J., entered judgment for plaintiff, and defendants appealed.

The District Court of Appeal, Peters, P. J., held that where lessee exercised option on or before date fixed in lease, and lease was silent about exact time of payment, payment by lessee within one month after exercise of option was within a reasonable time, and lessee was entitled to refund of excess amount paid. The court further held that lessee was not liable for property insurance taken by lessors where lessee had insured realty with lessors' knowledge.

Judgment affirmed.

1. Appeal and error 🔑760(1)

Briefs on appeal which purported to make detailed statement of facts, but which were not supported with transcript references, did not comply with rule requiring that statement of any matter in record shall be supported by appropriate reference to record. Rules on Appeal, rule 15(a).

2. Landlord and tenant 🔑92(1)

Where lessors deposited deed in escrow under lease granting lessee option to purchase realty and restaurant thereon, but stipulated that lessee in addition to purchase price pay insurance charges, and did not release chattel mortgage on restaurant equipment from lessee to lessors, there was no "deposit" under the lease as of that date, and lessee was not bound by lessor's act as fixing his rights under option as of that date.

3. Vendor and purchaser ⚷18(3)

The "exercise" of an option to purchase property is merely election of optionee to purchase property.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Exercise".

4. Vendor and purchaser ⚷18(3)

Except where required by statute to be in writing, an option to purchase realty may be exercised or orally accepted unless contract requires a written acceptance, and payment or tender is not essential to a valid exercise unless it is a condition precedent.

5. Vendor and purchaser ⚷75, 78

If no time is specified in an option to purchase realty, acceptance must be within what is a reasonable time under circumstances, and principle that time is of essence of an option generally applies only to acceptance, and not to performance.

6. Vendor and purchaser ⚷18(3)

An optionor who has given option to purchase realty within a specified time, may not do any act or omit to perform any duty calculated to cause optionee to delay in exercising his right.

7. Landlord and tenant ⚷92(1), 197

Under lease giving lessee option to purchase by a certain date at price lower than if option were exercised at subsequent date, once option to purchase was exercised, lease and option agreement no longer existed, but a binding contract of purchase and sale came into existence between lessors and lessee, and lessee was not liable for rent under lease for period after option was exercised.

8. Landlord and tenant ⚷92(1)

Where lessee's bank manager, on behalf of lessee, notified lessors of lessee's election to purchase realty under option contained in lease, and instructions of lessee were filed with title company within option period, both were continuing acceptances and were in effect on last day on which option could be exercised.

9. Landlord and tenant ⚷92(1)

Under lease granting lessee an option to purchase realty, deposit of money and vouchers in escrow by agent of lessee before date by which option was to be exercised constituted a timely acceptance of option.

10. Landlord and tenant ⚷92(1)

Where lease gave lessee option to purchase by certain date at price lower than if option were exercised at subsequent date, but did not specify time of payment, evidence that lessee accepted option and deposited money in escrow within reasonable time after acceptance of option, and that lessors placed deed in escrow subject to invalid limitations established a completion of option to purchase and created a valid contract of purchase.

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Norman S. Menifee, Redwood City, Henry F. Wrigley, San Francisco, Attorneys for Appellants.

Hugh F. Mullin, Jr., John A. Cost, San Mateo, Attorneys for Respondent.

PETERS, Presiding Justice.

Murfee contracted with Doelger for the lease of a restaurant. The written lease gave Murfee an option to purchase the premises for $30,000, if such right were exercised at the end of the 30 months from the inception of the lease; otherwise, he was given the right to purchase for $35,000 during the next 30-month period. The first 30-month period expired on June 20, 1947. Prior to that date Murfee, through his agents, notified Doelger, or his agent, that he intended to exercise the option. Doelger, by his agent Porter, had deposited a deed in escrow on May 19, 1947. Various complications arose, hereafter discussed, and on June 24, 1947, Doelger demanded the return of his deed from the title company. On June 30, 1947, Doelger notified the title company that the deal should be closed only upon Murfee paying $35,000, plus $469.40 for insurance paid for by Doelger. On July 25, 1947, Murfee paid $35,469.40, under protest, and then brought this action to recover $5,469.40, the claimed excess. The trial court determined that Murfee was not liable for the insurance premiums; that he had notified Doelger prior to June 20, 1947, that he intended to exercise the option, and that, under the terms of the agreement, the money did not have to be in escrow on that date but that Murfee had a reasonable time thereafter to make the payment. Judgment was granted for Murfee for $5,469.40, and Doelger and his agent appeal.

[1] In their respective briefs both counsel purport to make a detailed statement of facts. Appellants have not supported their statement with a single transcript reference, the respondent with but one such reference. Rule 15(a) of the Rules on Appeal requires that: "The statement of any matter in the record shall be supported by appropriate reference to the record." Such failure to comply with the rules has imposed an entirely unnecessary burden on this court.

The transcript shows the following: In December of 1944, Murfee desired to purchase the Villa Chartier, a restaurant and bar located in San Mateo County. The then owner wanted $30,000 for the realty and $25,000 for the stock and equipment. Murfee was able to raise the money to purchase the stock and equipment, but was unable to raise the money to buy the realty. Under these circumstances he asked Doelger, a friend of long standing, to invest in the property, offering to lease the premises from Doelger for $400 per month for some fixed period. Doelger ageed, and purchased the real property for $30,000, $20,000 of which was secured by means of a loan from the Bank of America, Doelger putting up the balance of $10,000 in cash. For purpose of convenience, Doelger took title in the name of appellant A. L. Porter, one of his employees, but admittedly Doelger was the real owner.

On December 20, 1944, respondent, and another person whose interest has since been purchased by respondent, and Porter, on behalf of Doelger, entered into a lease and option agreement. The instrument provided that the lease was to be for 5 years, and that the monthly rent of $400 per month should be payable on the 20th of each month. As security for the rent and the performance of the other obligations of the lease, Murfee gave appellants a chattel mortgage on all of the personal property located on the premises.

The instrument also gave Murfee an option to purchase the real property. It is the interpretation of this clause that presents the pivotal question on this appeal. It reads as follows: "In addition thereto, and as a material part hereof, the Lessees shall have, and they are hereby given the right or option, at the end of the first thirty months hereunder, but not before then, to purchase the said demised premises for the agreed sum or purchase price of Thirty Thousand Dollars ($30,000.00), plus the amounts, if any, Lessor may hereafter be required to expend for capital improvements or public assessments in connection with said demised premises; and if the said option is not exercised by the Lessees at the end of said first thirty months, the Lessees shall have, and they are hereby given, the right or option at any time thereafter and within the succeeding thirty months, to purchase said premises for the sum of Thirty-five Thousand Dollars ($35,000.00); plus the amounts, if any, Lessor may hereafter be required to expend for capital improvements or public assessments in connection with said demised premises; and upon the purchase of said premises by the Lessees at or after the expiration of the first thirty months, all liability for future rents hereunder shall terminate."

The lease expressly required that Murfee, at his own expense, should keep all improvements and personal property on the premises insured in favor of lessors against fire or other casualty in companies satisfactory to Doelger.

Murfee proceeded to operate the premises under this lease-option agreement. Between December of 1944, and July of 1947, he expended over $50,000 in improvements. At all times here relevant Murfee kept all the personal property and improvements fully and adequately insured. Neither Miss Porter nor Doelger ever made inquiry of Murfee concerning the insurance, or ever requested him to take out a policy.

In March of 1945, Doelger, at the request of the Bank of America to have the property insured to protect its loan, without inquiry of or consultation or notification to Murfee, took out $20,000 fire insurance. The premium on this policy was $469.40. Doelger's office wrote insurance, and that office handled this policy, on which Doelger made a commission of about $90. Murfee was not billed for this premium until the escrow for the purchase was created, at which time he first learned that Doelger had taken out this duplicating policy.

About a year and a half before the first 30-month period had expired, Murfee offered to buy the property from Doelger, but the later refused on the ground that he would rather have the $400 monthly rental during this 30-month period.

The 30-month period expired on June 20, 1947. In April of that year Murfee began negotiations with the Burlingame branch of the Bank of America to secure a loan to assist him in the purchase of the property pursuant to the terms of the option. The bank ordered a preliminary title search, which was issued on April 29, 1947. The manager of the bank testified that on May 20, 1947, he called Miss Porter, the holder of the record title, and informed her that Murfee was ready to close the transaction. She replied that the offer was a month too early. As a matter of fact, however, on the previous day, May 19, 1947, Miss Porter had deposited in escrow a deed naming Murfee as grantee, with a demand for $30,869.40, claiming $30,000 principal, $400 for rent not then due from May 20th to June 20th, and $469.40 for the insurance premium. Miss Porter placed no time limit on the escrow, and, in particular, gave no instruction that it could not be closed after June 20, 1947. She testified, however, that she construed the option clause to require the escrow to be closed no later then June 20, 1947.

Between May 20th and June 20th various complications arose which delayed the actual payment of the money into escrow.

Between these dates Murfee became involved in litigation with his wife, and the bank required that she sign releases to this property before it would complete the loan. On June 17, 1947, the bank sent instructions to the title company, and included therewith were releases from Mrs. Murfee and a deed from her to Murfee. At this same time the title company received authority from the bank to draw on it for an additional amount, and to pay that amount to Mrs. Murfee. Thus, the record shows that this complication was entirely cleared up prior to June 20, 1947. The bank manager did testify, however, that on June 20, 1947, a formal satisfaction from Mrs. Murfee had not been received, and that until the bank had received such a document it would not have financed the transaction.

Another complication developed over a tax lien on the property amounting to $5,743.73. This was paid by Murfee some time prior to June 20, 1947, and the bank so informed the title company early in May of 1947. Nevertheless, no release of the lien appeared in the county records, and it was not until June 25, 1947, that the title company received a letter from the revenue department of San Mateo County acknowledging payment of the tax claim stating that an official release would thereafter be issued.

Other difficulties arose over the chattel mortgage on the personal property held by appellants. When Miss Porter delivered the deed to the title company on May 19, 1947, she did not send a satisfaction of the chattel mortgage, and, in fact, such a satisfaction was not secured from appellants until late in July of 1947, the acknowledgement of the notary being dated July 31, 1947. The manager of the title company testified that this satisfaction was not indispensable, and that the title company could have closed the escrow without it, but the bank manager testified that, under the bank's rules, he could not advance the purchase price to Murfee until this satisfaction had been secured.

In order to secure the bank loan, Murfee was required to give a chattel mortgage to the bank. Notice of the mortgage was published on June 24, 1947, and the 7-day period of notice did not expire until July 2, 1947.

On June 17, 1947, the bank put up the $30,000 with the title company, but made no provision for the payment of the premium on the fire insurance. The title company received the vouchers in reference to the deal on June 19th, but because of the required notice to be given on the chattel mortgage, the bank requested that the closing date be July 2, 1947. Miss Porter, however, demanded the payment of the insurance premium.

On June 24, 1947, Miss Porter, by messenger, demanded the return of her deed to Murfee, but the title company refused to surrender it. On June 30, 1947, Miss Porter sent additional instructions to the title company, ordering it not to close the deal unless Murfee paid $35,000 for the property, plus $469.40 for the insurance premium.

The transaction could have been closed on July 2, 1947, and perhaps on June 19, 1947, because on that date the money demanded had been deposited, but it was not actually closed until July 25, 1947, because of the dispute over the amount of the demand. Murfee paid the extra $5,469.40, under protest, in order to protect his rights, and then filed this action against Doelger and Porter to recover that sum.

The theory of the trial court in allowing Murfee to recover is disclosed in the following two findings:

"It is true that plaintiff had a reasonable time after the end of the thirtieth month, to-wit, after June 20, 1947, to tender payment of the $30,000.00 due as the purchase price; and it is true that said purchase price was tendered to defendants within a reasonable time after said 20th day of June, 1947. It is also true that the demands of the defendants contained in the instructions to the California Pacific Title Insurance Company, * * * were excessive in the sum of $869.40, since the $400.00 rental for the period from May 20, 1947, to June 20, 1947, was not then due and was thereafter paid on the regular rental day of May 20, 1947, and that the sum of $469.40 alleged by defendants would be due for insurance was an improper demand on plaintiff."

"It is true that the demands of defendants contained in said instructions to said Title Company were excessive in the sum of $5,469.40 in that the $469.40 for insurance taken out by defendants was not chargeable to plaintiff * * * and since the $5,000.00 in addition to the purchase price of $30,000.00 was not a valid demand on plaintiff inasmuch as plaintiff should have been allowed a reasonable time from June 20, 1947, to tender to defendants the sum of $30,000.00, as the option had been exercised by plaintiff prior to the thirty month period provided for in the above referred to option to purchase * * *."

The basic legal question presented is whether, under the lease-option agreement, Murfee was not only required to notify Doelger of his election to purchase before June 20, 1947, but under conditions then existing, he was also required to tender the purchase price not later than that day.

Appellants contend that, under such an agreement, tender of the purchase money must be made before the expiration of the option.

Of course, the problem is one of intent. If the contract requires a tender of the purchase price before a specific date, time being of the essence of the option, the money must be tendered as specified, but the real question is whether, when a contract, such as the one here involved, confers an option which must be exercised on or before a fixed date, and is silent about the exact time of payment, the purchase price must be tendered on or before the date fixed for the exercise of the option, or whether the purchaser has a reasonable time thereafter to comply. The problem is discussed in an annotation in 101 A.L.R. 1432, where many cases involving various factual situations are collected and discussed.

The two California cases cited by appellants in support of their contention are cases where the contract was explicit as to time of payment. The following quotation from Mariposa Commercial & Mining Co. v. Peters, 215 Cal. 134, at page 142, 8 P.2d 849, 852, demonstrates the distinction between that case and the instant one: "As already stated, the lease provided that if notice of election to exercise the option were given to respondent by November 25, 1929, *and if the purchase price of* $570,000 *were paid by November* 30, *1929,* appellants could purchase, providing that at that time they were not in default under the terms of the lease. * * * In the second place appellants at no time paid or tendered the purchase price * * * which by the provisions of the lease and option had to be paid by November 30, 1929. Not having complied with the terms thereof the option terminated November 30, 1929." (Italics added.)

In Heine v. Treadwell, 72 Cal. 217, 13 P. 503, the other California case relied upon by appellants, the court based its decision upon its interpretation of the option agreement, holding that, under the express terms of that agreement, the purchase price had to be tendered at a time specified in the agreement. The action was one of ejectment. The lease gave the defendant the "privilege of purchasing at any time during the term for $3,250, upon giving 10 days' previous notice of his election so to purchase * * *." 72 Cal. at page 219, 13 P. at page 504. The court quite properly held that, under the terms of the lease, tender of the purchase price was required before the lease had expired.

A case more closely analogous to the instant one is Cates v. McNeil, 169 Cal. 697, 147 P. 944. There, the plaintiff brought an action in unlawful detainer, claiming that defendants were unlawfully holding over after the expiration of their lease. Defendants cross-complained, seeking specific performance under a provision of the lease giving them an option to purchase the leased premises. The option rights expired on May 27, 1912. Defendants had served upon plaintiff a notice of election to buy on May 25th, but had not then deposited the purchase price. The pertinent provision of the lease provided, 169 Cal. at page 700, 147 P. at page 945: "And in case the party of the second part shall not exercise its right and option to purchase said land within two years from date hereof, then and in that event such right and option to purchase shall absolutely determine and be null and void, except that the party of the second part, after having paid the rent on said property for the term of ten years, shall then have the right and option to purchase said property for the price of $600 per acre."

The dispute arose at the termination of the ten-year period. Plaintiff argued that there was no valid acceptance by defendants because a tender had not been made within the ten-year period. In disposing of the contention the court stated, 169 Cal. at page 706, 147 P. at page 948: "We do not deem it necessary here to discuss the terms of the notice served on appellants as to whether it constituted a tender of the purchase price at that time or not. The option clause gave the respondents a right to purchase the leased premises for the price of $600 an acre. There is nothing in the option clause which requires payment of the price of the land to be made or tendered when the option right is exercised in order to constitute an acceptance. Payment may or may not be made an essential condition to the exercise of such a right, just as the parties see fit to provide for in the option agreement. But nothing is said about payment in the option clause here. It is not even mentioned. What the respondents acquired under the option cause was an irrevocable right of option to purchase the property at a specified price if they should at the end of ten years elect to do so, and all that was necessary on their part to do, as far as the terms of the option are concerned, in order to constitute a binding contract for the sale and purchase of the premises, was to give notice of their acceptance of the right. This they did. Payment of the purchase price at that time was not a condition required by the option, and it is not for the court to incorporate terms in it which the parties to it did not incorporate or even mention. Of course, payment would be essential before respondents would be entitled to a conveyance of the land, but that is a matter pertaining to the performance of the contract of purchase and sale which had been created by the acceptance. In the absence of anything in the contract itself, the obligation of the parties in the performance of the contract is governed by the law applying generally to bilateral contracts for the purchase and sale of property under which the agreement or covenant of the vendor to convey and the vendee to pay the purchase price are considered mutual and dependant covenants, and are to be performed contemporaneously by the respective parties. Each party must perform his part in carrying out the contract, and do so within a reasonable time after the contract is created. The payment of the purchase price and the delivery of the deed are to be done concurrently, and, as the option clause here did not provide otherwise, respondents were not bound to make payment of the purchase price until appellants were prepared to make them a deed conveying to them a good title to the premises."

[2] While it is true that in the Cates case the sellers did not deposit a deed, while in the instant case Doelger did deposit a deed prior to the expiration of the 30-month period, that fact cannot serve to distinguish the two cases because Doelger had also filed instructions calling for the payment of insurance, and Miss Porter failed to file a release of the chattel mortgage held by appellants. Thus, the deposit of the deed was subject to conditions not contained in the contract. Under the contract, appellants had no legal right to take out insurance as long as Murfee had the property insured. Appellants took out the insurance without Murfee's knowledge, permission or consent. They had no legal right to impose this charge of $469.40 upon him. So far as the chattel mortgage is concerned, the bank manager testified that he could not advance the money until a release of the chattel mortgage had been given. Thus, appellants' deposit of the deed was subject to invalid limitations and amounted, legally, to no deposit at all.

[3-7] The rule of the Cates case is sound and in accordance with generally accepted legal principles. Supported by many cases, these general principles are expressed as follows in the following authorities: "The 'exercise' of an option is merely the election of the optionee to purchase the property." 66 C.J. 497. "Except where required by statute to be in writing, an option may be exercised or accepted orally unless the contract requires a written acceptance * * *." 66 C.J. 499. "* * payment or tender is not essential unless it is a condition precedent." 66 C.J. 500. "If no time is specified the acceptance must be within what is a reasonable time under the circumstances of the particular case. The principle that time is of the essence of an option generally applies only to acceptance and not to performance." 66 C.J. 503; see, also, 55 Am.Jur. 512. "It is a general rule that an optionor who has given the right to purchase property within a specified time may not do any act or omit to perform any duty calculated to cause the optionee to delay in exercising the right." 55 Am.Jur. 510. For a detailed discussion of these general principles see 3 Thompson on Real Property (Per. Ed.), §§ 1325, 1329, 1330 and 1331; Vol. 8, §§ 4569 and 4573. Once the option to purchase was exercised, the lease and option agreement no longer existed, and a binding contract of purchase and sale came into existence between the parties. 55 Am.Jur. 494; Smith v. Post. 167 Cal. 69, 138 P. 705; W. G. Reese Co. v. House, 162 Cal. 740, 124 P. 442.

[8] Appellants argue that the finding that Murfee notified Doelger of his intent to exercise the option within the time required by the agreement is unsupported, apparently on the theory that no election was made exactly on June 20, 1947. Such an argument places formalism ahead of substance. The bank manager, on behalf of Murfee, notified appellants of Murfee's election to purchase on May 20, 1947, and the instructions of the purchase were filed with the title company under date of June 17, 1947. Both were continuing acceptances, and in effect on June 20, 1947.

[9, 10] The acceptance here was clearly timely and complete. The appellants had deposited their deed on May 19, 1947, subject, however, to invalid instructions. The bank deposited its money and vouchers in escrow on June 19, 1947. This was a clear

acceptance. The delay caused by the publication of the chattel mortgage did not qualify the acceptance. Releases filed by Mrs. Murfee on June 17th cleared any claim she might have had on the $30,000. The tax liens were paid prior to the 20th, and the fact that the title company was not so notified by the county was immaterial. Had appellants' demands not been in excess of the amount called for by the lease, the whole transaction could have been closed on the 20th, subject only to the time interval required to publish notice in connection with the chattel mortgage. The delay was largely caused by appellants. At any rate, the money was deposited within a reasonable time. This being so, the acceptance was timely.

The judgment appealed from is affirmed.

WARD and BRAY, JJ., concur.

96 Cal.App.2d 89

CHURCH v. CITY OF LOS ANGELES et al.

Civ. 17308.

District Court of Appeal, Second District, Division 1, California.

Feb. 16, 1950.

Hearing Denied April 13, 1950.

Norman W. Church brought action against the City of Los Angeles, a political subdivision of the State of California, and the County of Los Angeles, a political subdivision of the State of California, to recover taxes which had been imposed and paid under protest on plaintiff's horses which had been present on tax date in the County of Los Angeles at horse races.

The Superior Court of Los Angeles County, Joseph W. Vickers, J., rendered a judgment for the plaintiff, and the defendants appealed.

The District Court of Appeal, Drapeau, J., held that the situs of the horses for tax purposes was not in the County of Los Angeles but in Santa Clara County where home ranch of horses was located.

Judgment affirmed.

1. Taxation 🔑260

Tangible personalty is to be taxed at place where it is permanently located.

2. Taxation 🔑261

Where resident of the County of Los Angeles owned and operated two ranches in Santa Clara County, one for breeding horses and other for racing and training, and horses were shipped to race meets within the state and also in other states, and between races horses were returned to ranch in Santa Clara County for rest, tax situs of horses was in Santa Clara County and not in the County of Los Angeles where horses were present at races on tax date.

Ray L. Chesebro, City Attorney, Los Angeles, Hugh H. MacDonald, Deputy City Attorney, Los Angeles, Harold W. Kennedy, County Counsel, Los Angeles, Gordon Boller, Deputy County Counsel, Los Angeles, for appellants.

John Moore Robinson and Robert M. Himrod, Los Angeles, for respondent.

DRAPEAU, Justice.

The facts in this case are not disputed. Plaintiff at all times material herein has been a resident of the County of Los Angeles. He has been in the business of breeding, training, and racing horses for many years. He owns and operates two ranches in Santa Clara County, one for breeding, the other for racing and training. Colts are foaled and trained in Santa Clara County, or purchased in Kentucky and trained in Santa Clara County.

When ready for racing, horses are shipped to race meets in California and in other states. During a meet they are raced, stabled, and taken care of at the track where the meet is held. When the meet is over they are sent to other meets in other places. Sometimes the horses go first to Bay Meadows track in northern California, then to the Santa Anita track in southern California, and then to meets in eastern states. And sometimes the order is reversed, and the horses are sent first to other states, and then back to one or more of the California tracks.

The horses are for sale wherever they may be. Some are entered in "claiming" races. In such races a certain purchase price for the horse is stated, and, under conditions not necessary here to relate, the owner must sell at that price if any buyer "claims" the horse.

While twelve of plaintiff's horses were at Santa Anita, they were assessed and taxed as personal property for the County of Los Angeles and the City of Los Angeles. The same horses had been assessed for tax purposes in Santa Clara County also. These horses were at a race meet at Santa Anita between December 29, 1945, and March 16, 1946, which, of course, included the first Monday in March, when taxes become a lien.

The tax in Los Angeles County was paid under protest, and the plaintiff brought his action for recovery. The trial court found that the plaintiff's ranch property in Santa Clara County was the place for rehabilitation and maintenance of the horses when not away racing, and, that, when the horses were away racing, it was the intent of the plaintiff to return them to Santa Clara County. From the findings conclusions of law were made that the taxable situs of the horses was Santa Clara County, and that the taxes assessed and collected by the Los Angeles County Tax Collector were unlawful, and judgment passed accordingly. From this judgment defendants Los Angeles County and City of Los Angeles appeal.

Appellants assert that the horses are subject to tax in Los Angeles County for the following reasons:

1. The domicile of plaintiff, the owner of the property, was in the County of Los Angeles.

2. The operating or business situs of the property on the tax date was in the County of Los Angeles.

3. The property was present on the tax date in the County of Los Angeles as in a market for sale.

These reasons are summed up in the further statement in the County's brief: "The rule at common law and still applicable today declares the situs of personal property to be with the owner thereof and is expressed by the Latin phrase *mobilia personam sequuntur.*"

The appellants instance taxation at the owner's domicile of ocean-going ships, railroad rolling stock, commercial busses and trucks, airplanes, and mobile machinery of contractors engaged in the construction of roads, dams, and other improvements.

[1] The rule, however, has one well-recognized exception: Tangible personal property is to be taxed at the place where it is permanently located. That place is the situs of the property for tax purposes. Brock & Co. v. Board of Supervisors, 8 Cal.2d 286, 65 P.2d 791, 110 A.L.R. 700.

The trial court found against the County and City on this ultimate fact, and the finding is supported by substantial evidence. Appellants' contention, coming at the very end of their reply brief, that the findings do not support the conclusions, and that the findings and conclusions do not support the judgment, have been examined despite the rule, Gould v. Richmond School Dist., 58 Cal.App.2d 497, 136 P.2d 864, and is without merit.

It is argued that this case presents a matter of law only, and that it is a case of first impression in California, insofar as the situs for taxation of race horses is concerned.

[2] It is therefore held that race horses come within the exception. There can be no better example of permanence of location than in the management of this kind of personal property. There is a home ranch, where the animals are raised and trained; from whence they go to race; to which they return for rest and recuperation when not on the road; and to which, finally, some more fleet and fortunate than others come back, to enjoy an honorable retirement.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

96 Cal.App.2d 138

CARNATION CO. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 17517.

District Court of Appeal, Second District, Division 3, California.

Feb. 17, 1950.

Mandamus proceeding by the Carnation Company, a corporation, to compel the Superior Court of the state of California, in and for the county of Los Angeles, to annul an order quashing a subpœna for the taking of deposition. Mrs. Andrew L. Harwell, as guardian ad litem of Donald Harwell, and Ronald Harwell, minors, were real parties in interest.

The District Court of Appeal, Shinn, P. J., held that defendant was entitled to take the deposition of a doctor who treated injured consumers who were suing the corporation.

Writ granted.

1. Depositions ⚷14

Under statute, food manufacturer was entitled to take deposition of doctor who treated injured consumers notwithstanding doctor stated he would be present at trial and had already given manufacturer a report of his medical findings and a special laboratory report. Code Civ.Proc. § 2021, subd. 6.

2. Depositions ⚷9

Statutory right to take depositions may not be withheld or curtailed in discretion of the court. Code Civ.Proc. § 2021, subd. 6.

3. Mandamus ⚷40

A writ of mandate will issue to compel a trial court to enforce statutory right to a deposition and compel a witness to testify. Code Civ.Proc. § 2021, subd. 6.

James V. Brewer, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, John B. Anson, Deputy County Counsel, Los Angeles, for respondent.

Vince Monroe Townsend, Jr., Los Angeles, for real parties in interest.

SHINN, Presiding Justice.

An alternative writ of mandate was issued in this proceeding requiring the superior court to annul its order quashing a subpoena for the taking of the deposition of a witness or to show cause why it had not done so. It appears from the answer to the alternative writ that the order has not been annulled. The real parties in interest, being plaintiffs in an action pending in the superior court, assert the validity of the order quashing the subpoena. The question for decision is whether Carnation Company, the petitioner herein, had a right to take the deposition of one, Dr. R. F. Harwell, under the circumstances hereinafter related.

Donald Harwell and Ronald Harwell, minors, by their guardian ad litem, Mrs. Andrew L. Harwell, brought suit against Carnation Company for the recovery of damages alleged to have been sustained in drinking milk "bottled, prepared, produced and distributed" by the defendant and which it was alleged contained "a large quantity of varnish, paint, and/or other foreign substances which is totally detrimental for human consumption." The defendant answered denying the material allegations of the complaint, and took the deposition of Mrs. Andrew L. Harwell, mother of the minors and their guardian ad litem. From the deposition it appeared that the minors are twins three years of age; that the children were taken ill; Dr. Harwell was called in, examined them, administered treatment, and continued to treat them for a considerable period of time. Included in the prayer for damages in the complaint was a demand for $500 for medical expenses of the plaintiffs. Defendant caused to be filed an affidavit for an order requiring Dr. Harwell to give his deposition and requiring him to produce X-rays of the patients and his records with respect to his findings, diagnosis and prognosis and of the calls made by him at the home of the patients and other calls at his office. A subpoena in due form was issued and proper notice was given plaintiffs' attorney. Plaintiffs then gave notice of a motion to quash the subpoena and all proceedings for the taking of Dr. Harwell's deposition specifying as grounds for the motion "that the doctor was not a party to this action and upon the further ground that he will be available for testimony at the time of the trial of the cause herein." An affidavit of Dr. Harwell was filed stating that the giving of his deposition would result in "gross inconvenience to him" and that he would be "damaged irreparably" if required to leave his work to give his deposition. The affidavit further stated that he would be present at the time of the trial and that he had already given to the defendant a report of his medical findings and a special laboratory report "of the materials alleged to have damaged the plaintiffs." A reply affidavit was filed on behalf of the defendant which set forth specifically particulars with respect to facts allegedly within the knowledge of Dr. Harwell which could not be established by any other witness. Upon a consideration of the foregoing the court granted the motion to quash the deposition proceeding.

Petitioner relies upon subdivision 6 of section 2021, Code of Civil Procedure, which gives a party a right to take a deposition "When the witness is the only one who can establish facts or a fact material to the issue; provided, that the deposition of such witness shall not be used if his presence can be procured at the time of the trial of the cause".

[1] The resistance of the respondents asserts that no facts are known to Dr. Harwell which cannot be established by other witnesses; that Dr. Harwell has furnished petitioner with all the information to which it is entitled and that it is unnecessary to take his deposition inasmuch as he intends to be present at the trial. Underlying the opposition to issuance of the writ is the theory that it is discretionary with the court to permit the taking of a deposition under subdivision 6 of section 2021 if it appears that the witness intends to be present at the trial. All the asserted defenses to the issuance of a writ are without merit. Petitioner has a clear legal right to take the deposition of Dr. Harwell.

It requires no argument to establish that Dr. Harwell, as the physician who examined and treated the plaintiffs when they were first taken ill and for several weeks thereafter, is in a position to testify as to matters that are not within the knowledge of any other person. His knowledge as to the symptoms and complaints of the patients, his observations and discoveries during his examination, his methods of treatment and his observations as to reactions to treatment are all peculiarly within his knowledge. The respondents say in their answer that petitioner does not desire in good faith to take the deposition of Dr. Harwell "but are merely doing so in an attempt to get a record for the purpose of making argument against the doctor as a witness in the trial of this action and for the purpose of attempting to compare argumentatively his medical opinion with that of the medical opinion of the said Dr. Dodge, the employee of the petitioner." It is, of course, immaterial what the motives of petitioner are if it has a clear legal right to take Dr. Harwell's deposition. However, we would assume that the objectives attributed to petitioner are among those which moved the legislature to extend to litigants the right to take depositions under various circumstances. It is not only proper but approved and common practice for parties to take steps for the discovery of evidence they may be required to meet upon trial, and to employ for that purpose the deposition procedure whenever it is available. It is the avowed purpose of plaintiffs to use Dr. Harwell's testimony in an effort to prove that they suffered injury from drinking a deleterious substance produced and sold by petitioner. In a case such as this it must be assumed that the attending physician will be called upon to testify to facts which would be highly important, if not necessary, for medical experts to consider in the formation of opinions upon that issue. The case therefore falls within subdivision 6 of section 2021.

[2, 3] The statutory right to take depositions may not be withheld or curtailed in the discretion of the court. The cases have consistently so held. "Insofar as the

propriety of the use of the writ for this purpose is concerned, it is well settled that there is a clear duty on the trial court to enforce the statutory right to a deposition and compel a witness to testify." Brown v. Superior Court, 34 Cal.2d 559, 212 P.2d 878, 879.

The order in question, if allowed to stand, would have the effect of forcing petitioner to trial without having taken the deposition of Dr. Harwell, and under circumstances which satisfactorily show that petitioner's right to take the deposition is absolute. It is the duty of the trial court to allow the deposition to be taken.

Let the writ issue.

WOOD and VALLÉE, JJ., concur.

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96 Cal.App.2d 204

PEOPLE v. VAN OS.

Cr. 4387.

District Court of Appeal, Second District, Division 2, California.

Feb. 23, 1950.

John Hendrick Van Os was convicted in the Superior Court of Los Angeles County, Stanley N. Barnes, J., of simple assault, and he appealed.

The District Court of Appeal, McComb, J., held that the trial court did not commit prejudicial error in instructing jury that simple assault was a lesser and included offense in the crime of wife-beating, and that the verdict finding defendant not guilty of robbery did not constitute a finding that he was not guilty of simple assault.

Judgment affirmed.

1. Criminal law 🔑1159(2)

Where record shows substantial evidence to sustain the jury's implied findings, the appellate court will neither consider discrepancies in the testimony nor weigh the evidence.

2. Indictment and information 🔑189(1)

The crime of simple assault is a lesser and included offense in the crime of wife-beating. Pen.Code, §§ 240, 273d.

3. Criminal law 🔑795(2)

In prosecution for robbery and wife-beating, evidence justified instruction that simple assault was a lesser and included offense in the crime of wife-beating. Pen. Code, §§ 240, 273d.

4. Criminal law 🔑878(3)

In prosecution for robbery and wife-beating, the finding of the jury that defendant was not guilty of robbery did not constitute a finding that he was not guilty of simple assault, since each count in the information stated a distinct offense, and the disposition of one count would have no effect or bearing upon the verdict with respect to the other counts. Pen.Code, §§ 240, 273d.

◆

W. E. Kalbfleisch Torrance, for appellant.

Fred N. Howser, Attorney General, Norman H. Sokolow, Deputy Attorney General, for respondent.

McCOMB, Justice.

After trial before a jury defendant was found guilty of simple assault. From the judgment and order denying his motion for a new trial, he appeals.

The evidence being viewed in the light most favorable to the people (respondent) the essential facts are:

Mable Van Os separated from her husband, defendant, May 3, 1948, and obtained an interlocutory decree of divorce from him. They reunited about December 10, 1948. On the night of December 30, 1948, she went driving with defendant in his car. They purchased some liquor which they consumed, and after a time parked the car and began discussing their domestic problems. Finally defendant told her he was going to leave her. She replied that was best and they had had enough trouble. Defendant then told her to get out of the car which she did, taking her purse with her. As she started walking she heard a car start up from behind her. Next she heard footsteps, and turned around and saw defendant. He grabbed her from behind, wrestled with her, hit her on the jaw and knocked her to the ground. As she tried to protect herself, he struck her on the head. He then grabbed her purse, ran to his car and drove away.

Defendant was charged with (1) robbery and (2) wife-beating. He was found not guilty of the first count, but guilty of simple assault, a lesser and included offense, on the second count.

Questions: First: *Was there substantial evidence to sustain the foregoing facts impliedly found by the jury in support of the judgment?*

[1] This question must be answered in the affirmative. The prosecuting witness gave direct testimony as to each of the facts stated above. Therefore there was substantial evidence to sustain the jury's implied findings. This being the state of the record, an appellate court will neither consider discrepancies in the testimony nor weigh the evidence. (People v. Pianezzi, 42 Cal.App.2d 265, 269, 108 P.2d 732.)

Second: *Did the trial court commit prejudicial error in instructing the jury that simple assault was a lesser and included offense in the crime of wife-beating?*

This question must be answered in the negative. Section 273d of the Penal Code reads in part: "Any husband who wilfully inflicts upon his wife corporal injury resulting in a traumatic condition, but not constituting a felonious assault or attempted murder * * * is * * * guilty of a felony * * *." Section 240 of the Penal Code reads: "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."

[2] From a reading of the two code sections it is clear that the crime defined in section 240 of the Penal Code is a lesser and included offense in the crime set forth in section 273d of the Penal Code. (Cf. People v. Burns, 88 Cal.App.2d 867, 871, 872, 200 P.2d 134, et seq.)

[3] In the present case the jury may not have believed that the altercation between the parties resulted in traumatic injury to Mrs. Van Os, yet they may have believed her testimony that defendant had the ability to, and did attempt to commit a violent injury on her person. Hence the trial judge properly gave instructions to the jury to the effect that they might find defendant guilty of a simple assault as a lesser and included offense in the crime of wife-beating.

Third: *Since the verdict of the jury found defendant not guilty of robbery, did this also constitute a finding that he was not guilty of simple assault?*

[4] This question must also be answered in the negative. Each count in an information or complaint which charges a separate and distinct offense must stand upon its own merit, and the disposition of one count has no effect or bearing upon the verdict with respect to other counts contained in the information or complaint. Hence a verdict of acquittal of one or more counts is not deemed to be an acquittal of any other count. (People v. Carothers, 77 Cal.App.2d 252, 254, 175 P.2d 30.) Since each count in the information stated a separate and distinct offense, the foregoing rule is applicable.

The judgment and order are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.

96 Cal.App.2d 92

BYER v. ARGUELLO et al.

Civ. 17161.

District Court of Appeal, Second District, Division 1, California.

Feb. 17, 1950.

Irvine Byer sued Francisca Arguello (sued herein as Jane Doe Aguilar), Manuel Arguello (sued herein as John Doe Aguilar), Edward Kramer, Rose Kramer, and others for the wrongful death of a three year old child allegedly bitten by dogs belonging to the defendants.

The Superior Court, Los Angeles County, Stanley N. Barnes, J., dismissed the action as to the defendants Kramer, and the plaintiff appealed.

The District Court of Appeal, White, P. J., held that the complaint averred that dog belonging to the defendants Kramer actually killed the child, and that an averment in the plaintiff's deposition which controverted that allegation did not alone show that no cause of action could be proven.

Judgment reversed and cause remanded.

Prior opinion 210 P.2d 328.

1. Dismissal and nonsuit ⚷53(2)

Courts have inherent power to dismiss actions on grounds that they are fictitious or sham.

2. Dismissal and nonsuit ⚷67

A motion to dismiss an action on ground that it is fictitious or sham is proper practice, but in each case question arises whether specific facts presented to court constitute grounds for an order of dismissal.

3. Dismissal and nonsuit ⚷53(1)

Before a motion to dismiss may be granted, the record must disclose that no relief can be granted to the plaintiff.

4. Dismissal and nonsuit ⚷53(2)

That allegation of complaint that death of child was caused by child's being bitten by defendant's dog was controverted by plaintiff's deposition stating that defendant's dog did not bite child did not justify dismissal of action on ground that it was fictitious or sham.

William S. Palmese, Jesse A Levinson, Los Angeles, for appellant.

Margolis & McTernan, by John W. Porter, Los Angeles, for respondents.

WHITE, Presiding Justice.

Plaintiff instituted this action to recover damages for the alleged wrongful death of his minor son as a result of the latter being attacked and bitten by dogs belonging to defendants Arguello and by a dog belonging to defendants Kramer. The gravamen of plaintiff's complaint is that defendants were the keepers of vicious dogs, that they did wrongfully harbor said dogs and allowed them to go at large without proper guard and without leash; that said dogs came upon the premises occupied by plaintiff and his minor child, and that said dogs did bite and attack the person of said child; that as a proximate result thereof said child died. Answers were filed denying these allegations.

When plaintiff's deposition was taken he testified that he did not contend that the Kramer dog bit the child; further that so far as he knew the Kramer dog did not bite the child at any time. Then he stated that his theory of Kramers' liability was that their dog was in heat, and it was negligence for them to allow the animal to go at large, an attraction for male dogs in the neighborhood where the Kramers and the child lived.

Defendants Kramer moved for a summary judgment, supporting said motion by affidavit setting forth the foregoing testimony of plaintiff as given in his deposition. The motion was denied. The same defendants them moved the court to dismiss the action against them on the ground that the same "is sham and fictitious." This motion was also supported by an affidavit similar to the one filed in support of the motion for summary judgment. The second motion was granted. From the judgment of dismissal entered thereon plaintiff prosecutes this appeal. No brief has been filed by respondents.

Following the filing of appellant's opening brief, respondents moved this court to dismiss the appeal, basing said motion upon the pleadings and the aforesaid affidavits on file. The motion was denied by this court. Byer v. Arguello, 94 Cal.App.2d 110, 210 P.2d 328.

[1-4] From a consideration of the record herein, we are satisfied that the pleadings in this action present triable issues. We are equally satisfied that our holding on the motion to dismiss (Byer v. Arguello, supra) is determinative of this appeal on the merits. In the cited case we said, 94 Cal. App.2d 111, 210 P.2d 329:

"Courts have inherent power to dismiss actions upon the grounds that they are fictitious or sham. Such a motion to dismiss is proper practise, but in each case the question arises whether the specific facts presented to the court constitute grounds for an order of dismissal. Cunha v. Anglo California Nat. Bank, 34 Cal.App 2d 383, 93 P.2d 572.

"In the present case the complaint specifically alleges that the Kramer dog killed the child. While it is true that the child's father in his deposition testified to facts contrary to the allegations of the complaint which he verified, it is better practise to dispose of issues by trial. Before a motion to dismiss may be granted the record must disclose that no relief can be granted to the plaintiff. People v. Nixon, 34 Cal.2d 234, 209 P.2d 385. From the complaint and the affidavits here under consideration, it can not be said that beyond peradventure of doubt no cause of action can be proven against the Kramers.

"Nothing herein contained is to be construed as approving plaintiff's far-fetched theory that a dog in heat not kept within bounds proves negligent liability of the owner for the acts of other dogs attracted to the neighborhood. This decision is based upon the fact that the complaint avers that the Kramer dog actually killed the child, and that while this averment is controverted by the testimony of the plaintiff on deposition, upon trial of the issue the plaintiff may be able to present testimony to support the complaint. To hold otherwise would be to open a veritable Pandora's box of motions to dismiss actions, based upon statements in depositions contrary to averments in complaints."

The judgment is reversed and the cause remanded.

DORAN and DRAPEAU, JJ., concur.

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96 Cal.App.2d 43

PEOPLE v. MINER et al.

Cr. 726.

District Court of Appeal, Fourth District, California.

Feb. 9, 1950.

Rehearing Denied Feb. 21, 1950.

Hearing Denied March 9, 1950.

Laura K. Miner, Nedra Montana Cordon and Josephine M. Page were convicted in the Superior Court of San Diego County, William A. Glen, J., of abortion and of conspiracy to commit abortion and from the judgment of conviction and an order denying a new trial, they appealed.

The District Court of Appeal, Barnard, P. J., held that the evidence was sufficient to sustain convictions and that the record disclosed no reversible error with respect to admission and exclusion of evidence or the giving and refusal of instructions.

Judgment and order affirmed.

1. Abortion 🔑11

Corroboration of testimony of woman on whom abortion was committed is necessary to support conviction, but such corroboration need not cover precisely the same facts as testimony of woman and it is sufficient if such corroboration tends to connect defendant with the offense and does more than create a mere suspicion of guilt. Pen.Code, § 274.

2. Abortion 🔑11

Evidence corroborating testimony of women on whom abortions were committed was sufficient to sustain conviction. Pen. Code, § 274.

3. Conspiracy ⇨47

Evidence of a plan, an actual working together and the commission of abortions charged as overt acts in indictment was sufficient to sustain conviction of conspiracy to commit the crime of abortion, though none of overt acts charged was sufficient in itself to demonstrate guilt of conspiracy. Pen.Code, § 274.

4. Criminal law ⇨855(7)

That deputy district attorney during recess expressed sorrow that juror's daughter was ill and, in response to inquiry by another juror concerning instructions, stated that he knew nothing about them and that they would be given by court did not entitle defendant to declaration of a mistrial on ground of prejudicial misconduct.

5. Criminal law ⇨673(5)

In prosecution for abortion and for conspiracy to commit abortion, evidence of similar offenses was admissible under proper instructions limiting the purpose thereof. Pen.Code, § 274.

6. Criminal law ⇨404(1)

A hose with aspirator attached and biopsy curette exactly similar to instruments seen in operating room of premises occupied by defendants were admissible for illustrative purposes in prosecution for abortion. Pen.Code, § 274.

7. Abortion ⇨9

Evidence that existence of pregnancy cannot be positively and absolutely determined for at least four months after conception was immaterial in prosecution for abortion, since belief and purpose of defendants and not the actual fact of pregnancy were involved. Pen.Code, § 274.

8. Criminal law ⇨422(8, 9)

In prosecution of three defendants for abortion and conspiracy to commit abortion, evidence of statement made more than ten years earlier by one defendant in presence of a codefendant, constituting a full admission and description of way in which they were then conducting business of performing abortions by practically the same method as that used in committing offenses charged, was admissible against the two defendants then present as bearing on question of intent with respect to abortion counts and in relation to conspiracy charge. Pen.Code, § 274.

9. Criminal law ⇨829(3)

Where jury was instructed that use of instrument or other means with intent thereby to procure a miscarriage was essential to constitute offense of abortion, refusal to give requested instruction that such intent could not exist unless defendants actually knew or believed that woman was pregnant was not error. Pen.Code, § 274.

10. Criminal law ⇨829(10)

Refusal to give requested instructions that woman suffering an abortion is a co-conspirator whose testimony must be corroborated was not reversible error, where court fully instructed as to the necessity for corroboration. Pen.Code, § 274.

11. Conspiracy ⇨48
Criminal law ⇨1172(1)

Where only the first count of indictment charging conspiracy to commit abortion involved overt acts and they were alleged and proved in connection with such count, instruction defining overt act and stating that at least one overt act must be expressly alleged in indictment and proved in order to support a conviction for conspiracy was not misleading or prejudicial, though not expressly limited to conspiracy count. Pen.Code, § 274.

12. Conspiracy ⇨41
Criminal law ⇨423(1)

Each of the persons forming a criminal conspiracy, while he is a member thereof, is liable for every act and bound by the acts and declarations of co-conspirators done or made in pursuance and furtherance of the conspiracy and every person joining a conspiracy after its formation is similarly liable for acts and declarations of coconspirators thereafter.

13. Criminal law ⇨673(4)

Instruction as to liability of each member of criminal conspiracy for acts and declarations of coconspirators made in pursuance and furtherance of conspiracy was not prejudicial to one of three defendants charged with conspiracy to commit abortion, though evidence had been admitted as to commission of abortions by two codefendants many years earlier, where jury was carefully instructed not to consider such evidence as against the third defendant. Pen.Code, § 274.

14. Criminal law ⚷507(6)

Women submitting to abortions are not "accomplices" of persons charged with commission thereof or with conspiracy to commit abortion. Pen.Code, § 274.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Accomplice".

15. Abortion ⚷11

The necessary corroboration of testimony of woman on whom abortion was committed may be found in evidence which is slight when considered alone, but which is sufficient to create more than a suspicion of guilt. Pen.Code, § 274.

16. Criminal law ⚷1172(7)

Instruction limiting the purpose for which evidence of other offenses might be considered and directing jury to view with caution such evidence was beneficial to defendants and not prejudicial.

17. Criminal law ⚷736(2)

Question of whether witness' direct inquiry of defendant as to her guilt constituted an accusatory statement so that her failure to make denial thereof might be considered as indicating an admission that accusation was true was properly left to jury.

18. Criminal law ⚷787(2)

Instruction as to right of court and counsel to comment on the failure of defendants to explain or deny any evidence against them was not erroneous. Const. art. 1, § 13.

19. Abortion ⚷11
Conspiracy ⚷47

Evidence sustained conviction of abortion and of conspiracy to commit abortion. Pen.Code, § 274.

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William F. Reed, San Diego, for appellants Miner and Cordon.

Thomas Whelan, Ann Wansley, San Diego, for appellant Page.

Fred N. Howser, Attorney General, Stanford D. Herlick, Deputy Attorney General, James Don Keller, District Attorney, Ronald Abernethy, Deputy District Attorney, San Diego, for respondent.

BARNARD, Presiding Justice.

In Count I of an indictment the appellants were charged with the crime of conspiracy in that during the period from June 1, 1947 to October 8, 1948, they conspired together to commit the crime of abortion. Six overt acts were alleged in that connection. In Count II Miner and Cordon were charged with the crime of abortion in that on September 3, 1948, they wilfully and feloniously employed an instrument and other means on the person of a certain woman with the intent to procure a miscarriage, the same not being necessary to preserve her life. In Count III Miner and Cordon were charged with a similar offense upon the person of another woman. In Counts IV, V, VI and VII Page and Cordon were charged with similar crimes in connection with four other women. A jury found all of the appellants guilty as charged in the respective counts, except on Count II which was dismissed. They were all sentenced to the state prison for the term prescribed by law, the sentences as to each one to run concurrently. They have each appealed from the judgment of conviction and from an order denying a new trial.

The appellants Miner and Page were chiropractors occupying certain premises in San Diego. From June 9, 1948 to September 22, 1948, these premises were under observation by an investigator for the district attorney's office. During that period a large number of women were observed coming to and going from these premises.

On the evening of September 19, 1948, two investigators entered these premises with the intention of installing a dictaphone. While there they observed various objects in the operating room, including an operating table covered with a sheet, and a hose and connection similar to one which was admitted into evidence. Before they accomplished their purpose they heard a lady's voice say "there is someone here," and then a voice called out "Laura" in a questioning tone. The investigators then left the premises through a window. The next morning a notice was found posted on the door of the office reading: "Office closed indefinitely. Hours by appointment." On that morning Page and Cordon were seen in animated conversation on the front porch. Shortly thereafter a car with several women in it was seen leaving the rear of the premises. During the morning a number of women came to the door and some remained until Cordon returned at 12:30 P.M. They entered with her and then left within five minutes. In the afternoon of that day Miner and Cordon were seen driving out of the alley in the rear of the premises.

Photographs were taken of the interior and exterior of these premises, which were introduced in evidence. Various objects taken from the premises were also introduced. An operating table was found in what had been a kitchen, standing near the sink. A rubber hose with an attachment thereto, which was identified as an "aspirator", was seen on the sink during the investigation, but was missing when the other objects were removed. An "X-ray mirror" was found installed between the office and the reception room which permitted anyone in the office to see who was in the reception room, although a person in the reception room could not see into the office. A pressure tank and pump was also found in this operating room. The city plumbing inspector testified that the use of this would increase the normal water pressure, that such equipment should be inspected to prevent back siphonage into the water system, and that the installation of this equipment on these premises had never been inspected by his department. The only reasonable inference is that this device was used to increase the efficiency of the aspirator. There is evidence that an aspirator is an arrangement whereby a stream of water creates a vacuum and produces suction. Many of the things taken from this operating room had blood stains upon them. Speculums and heating pads were among the things found there. A witness identified a speculum as one he had repaired for the appellant Miner. A witness testified that she came to the premises on the afternoon of September 20, 1948, for the purpose of having an abortion performed, and that another lady entered just ahead of her. The appellant Cordon called the other lady into the office and closed the door. In a short time the other lady reappeared and left the premises. Thereupon this witness was taken into the office where she was told by Cordon that no business was being done that day; that they were having a "slight investigation"; that they would have to be very careful; and to come back the next Monday if she still wanted anything done. She returned on September 27, and found a note on the door reading: "Office closed indefinitely. Gone to the East Coast."

The women directly involved in Counts III to VII, inclusive, testified as to what occurred on the respective counts. The procedure was about the same in each instance. The woman went there for an abortion; was interviewed by the defendant Cordon; was told that the fee for an abortion was $100; and an appointment was made. When the witness returned $100 was paid but no receipt was given. The witness was then taken to a resting room and requested to remove her clothing. Later she was taken to the operating room, placed on the operating table with her feet in the stirrups, and a sheet placed over her knees so that she did not have a full view of all that was done. The doctor then came in and proceeded with the work. They all felt pain or had cramps, and saw or heard water running out of the tap into the sink. Most of them observed a rubber tube similar to the one introduced in evidence, which was connected to the faucet in the sink, and some felt a scraping sensation in the abdomen and heard a suction sound. After the work was finished the woman was taken to a resting room and given an electric heating pad. After a short rest they were allowed to go home.

There was some additional testimony with respect to the particular counts. The women involved identified Cordon as the nurse, and Miner or Page as the doctor. On Count III the woman testified that she was taken to these premises by a man named Brett, and that he picked her up later; that she gave the nurse a sum of money but did not know the amount; and that this money was given her by Brett. Brett testified that he went to these premises first and made the appointment; that he then brought the woman to the premises and gave her $100 in currency; and that while she was in the office he waited about forty-five minutes for her and then took her home. On Count IV the woman testified that before going to the premises she discussed the purpose of her visit and the amount of money involved with her husband; that her husband met her there on September 17; that pursuant to instructions given her by Cordon she returned on September 20, 1948; that Cordon then met her and asked her to leave because they were expecting some investigators. Her husband testified that he had discussed with her the purpose of her visit to this office and the amount of the fee, and that by prior arrangement he met her there on September 17. On Count V the woman testified that she went to her appointment accompanied by two friends, and that Dr. Page said she "didn't recommend abortions every six months." She further testified that Page had treated her in a similar manner about six months before, and that she had paid Cordon another $100 on that occasion. The two friends testified that they took this woman to these premises on or about September 1, 1948, and that after driving around they came back later and picked her up. On Count VI, the woman testified that she was accompanied to the premises by a certain friend. This friend testified that she went there with this woman and knew her purpose in going there; that while she was waiting in the reception room she saw several other women go into the office; and that she observed that the door between the reception room and the office was locked after people entered. On Count VII the woman testified that on August 30, she went to these premises accompanied by her sister. Her sister testified that she knew the object of the visit and that they had discussed the subject of money prior thereto; that she accompanied her sister to the premises; that her sister went into the office and the door was closed; and that a little later her sister asked her to leave and stay away for an hour.

For the purpose of showing intent, evidence was introduced of four other similar offenses in June and August, 1948. In each instance the testimony of the women involved disclosed the use of the same plan and method of operation as that shown by the testimony on the various charges of the indictment. As against the appellant Miner, the testimony of another chiropractor was introduced. He testified that before the trial Mrs. Miner came to him and told him he would probably be called as a witness at the trial and asked his help, and that he told her he would be willing to help her if she was not guilty but not otherwise. He testified: "I then asked her point blank, 'Are you guilty?'. She hung her head, did not answer me and pulled out several pictures of her children."

[1, 2] Except with respect to the conspiracy count, it is not contended that the evidence, if it is to be accepted, is not sufficient to support the verdicts. It is contended, however, that there was not sufficient corroboration of the testimony of the women involved in the other counts. It is well settled that such corroboration is necessary but that it need not cover precisely the same facts, and that it is sufficient if it tends to connect the defendant with the offense and goes farther than creating a mere suspicion of guilt, People v. Ramsey, 83 Cal.App.2d 707, 189 P.2d 802; People v. Wilson, 25 Cal.2d 341, 153 P.2d 720; People v. Malone, 82 Cal.App.2d 54, 185 P.2d 870. It appears here beyond question that the appellants were operating some sort of business in these premises. With respect to each count there was the testimony of one or more witnesses who accompanied the abortee to the premises, and several of them furnished the money. In addition to the testimony of these other witnesses and the evidence of the articles found and removed from the premises it appears, without conflict, that these premises were equipped with a device to in-

crease the water pressure for some purpose; a device was installed so that people in the reception room could be seen from the office while the reverse was not true; there is independent evidence that when a woman was taken to the operating room the door was locked; and when it was discovered that an investigation was in progress the place was closed and appointments were cancelled. The appellants did not take the stand and no attempt was made to explain or give a reason for any of these circumstances. In our opinion, ample corroboration here appears.

[3] Some contention is made that the evidence is not sufficient to show a conspiracy, as charged in the first count. It is argued that none of the overt acts alleged in the indictment was proved. We are unable to understand this contention since five of the six overt acts which were alleged were sufficiently established by the evidence. The fact that none of these overt acts was sufficient, in itself, to demonstrate guilt is immaterial. The plan, an actual working together, and all of the elements of a conspiracy clearly appear from the evidence.

[4] It is contended that the deputy district attorney was guilty of prejudicial misconduct in talking to two jurors. During the trial, a matter was taken up out of the presence of the jury. It then appeared that during a recess one of the jurors entered the district attorney's office and asked a question of the deputy who was conducting the trial concerning the instructions that the court might give. The deputy told him that he knew nothing about the instructions, that he had nothing to do with that, and that this would come from the court. On another occasion, this attorney met a woman juror in the hall of the court house during a recess. She remarked that her little girl was sick and that she had been phoning to find out how she was getting along. The deputy remarked "I am terribly sorry. I hope everything is all right." The court correctly denied a motion for a mistrial, and instructed the jury to be more careful in the future. No possible prejudice appears. People v. Goodale, 33 Cal.App.2d 80, 91 P.2d 163.

[5-7] A number of errors are assigned in connection with the admission of evidence. Evidence of similar offenses was received for a limited purpose under proper instructions, and no error appears in that connection. People v. Peete, 28 Cal.2d 306, 169 P.2d 924; People v. Zatzke, 33 Cal.2d 480, 202 P.2d 1009. It is argued that a hose with aspirator attached, and a "biopsy curette," were improperly admitted in evidence since they were not taken from the premises involved. They were new articles secured from a supply house which were introduced for illustrative purposes, and there was ample evidence that they were exactly similar to instruments seen in the operating room of these premises. It is argued that the court erred in refusing to admit testimony offered to show that there is no positive and absolute way, for at least four months after conception, to determine whether or not pregnancy exists. This was immaterial since the belief and purpose of the appellants and not the actual fact of pregnancy is involved. People v. Ramsey, 83 Cal.App.2d 707, 189 P.2d 802. With one exception, all other errors cited in this connection are either unsubstantial or not supported by the record.

[8] It is argued that the court erred in allowing in evidence a statement made by the appellant Cordon, which was made in July, 1936. At that time the appellants Cordon and Miner were both working in another office in San Diego which, as the appellants state in their brief, "belonged to the coast-wide Rankin ring, See People v. Rankin, 10 Cal.2d 198, 74 P.2d 71." This statement was taken in connection with that case and was taken in the presence of appellant Miner, who gave a similar statement. This statement contained a full admission and description of the way the business of causing abortions was carried on in that office, the system thus used being practically the same as that used in this case, including the use of suction created by water pressure. A police officer testified that he interrupted the appellant Miner on one of these abortions at that office in 1936, and that he was present at a conversation in which both Cordon and Miner participated, and in which they both admitted

what they had been doing. This statement, and the officer's testimony, were offered for the purpose of showing intent, association of the parties at that time, and the admissions and declarations of a coconspirator at that time. They were admitted as against Miner and Cordon and not as against Page, and the jury was instructed not to consider this evidence in any respect as against the appellant Page. It not only had a bearing on the question of intent with respect to the abortion counts but also in relation to the conspiracy charge, insofar as the appellants Cordon and Miner were concerned. While this evidence was unnecessary, in view of the strong evidence of guilt otherwise produced, it was not rendered inadmissible by the lapse of time which appears. People v. Peete, 28 Cal.2d 306, 169 P.2d 924.

[9] It is next urged that the court misdirected the jury in matters of law. Error is first assigned in that the court refused to give an instruction requested by the appellants which stated that the gist of the offense denounced in section 274 of the Penal Code is that the instrument or other means must be used with intent to thereby procure the miscarriage of the woman in question, and that the necessary intent could not exist unless there was actual knowledge on the part of the defendants, or belief upon their part, that the woman in question was pregnant. It is argued that this instruction follows the direct holding in People v. Murphy, 60 Cal.App.2d 762, 141 P.2d 755, should have been given, and was not otherwise covered. In that case, there was evidence that the doctor operated upon the woman for another purpose entirely and the court held that the evidence was not sufficient to show anything to the contrary. In the instant case the appellants did not take the stand, no explanation of any kind was offered, and the matter of intent was left entirely to be drawn from the other facts and circumstances. Section 274 was read to the jury, and the jury was adequately told that in order to constitute the offense in question it was necessary to find that an instrument or other means had been used with the intent thereby to procure the miscarriage of the women in question. Having been told that this intent was essential, it was not necessary to tell the jury in different language that the intent could not exist if there was no such intent.

[10] It is next contended that the court erred in refusing two instructions to the effect that the woman suffering an abortion is a coconspirator and her testimony must be corroborated. Whether or not such a woman could be such a coconspirator, which is doubtful under recent decisions, the matter is of no importance here since the court fully, and at length, instructed the jury as to the necessity for corroboration.

[11] It is next contended that the court erred in giving an instruction in which the term "overt act" was defined, and in which the jury was told that the law requires that at least one overt act be expressly alleged in the indictment, and that at least one of the overt acts alleged must be proved in order to support a conviction for conspiracy. It is argued that the instruction should have told the jury that at least one overt act must be alleged in the first count which charges conspiracy, and must be proved with respect to that count. The instruction related to the matter of a conspiracy which affected only one count, and we are unable to see how the jury could have been misled or how prejudice could have resulted. Overt acts were not involved in any other count, and they were both alleged and proved in connection with the first count.

[12, 13] Objection is made to an instruction giving the usual rule that each of the persons forming a criminal conspiracy, while he is a member thereof, is liable for every act and bound by the acts and declarations of each and all of the conspirators done or made in pursuance and furtherance of the conspiracy, and that every person joining a conspiracy after the formation thereof is similarly liable for the acts and declarations of the other conspirators thereafter. While it is conceded that this is a correct statement of the law it is argued that it was prejudicial to the appellant Page in view of the evidence which was admitted with relation to things done by Miner and

Cordon in 1936. While these earlier acts had a bearing upon the intent of two of the parties, the jury was carefully instructed that they should not be considered as against the appellant Page. There is nothing to indicate that the jury disobeyed this instruction.

[14] It is contended that the court erred in instructing the jury that a woman submitting to an abortion is not an accomplice. No error appears. People v. Stone, 89 Cal.App.2d 853, 202 P.2d 333; People v. Wilson, 25 Cal.2d 341, 153 P.2d 720.

[15] Error is assigned in the giving of an instruction stating that corroboration may be found in evidence which is slight when considered alone, but which is sufficient to create more than a suspicion of guilt. It is argued that the instruction should have been given in other language which is suggested. Not only was this instruction correct, People v. Wilson, 25 Cal.2d 341, 153 P.2d 720; People v. Ramsey, 83 Cal.App.2d 707, 189 P.2d 802, but the court gave another instruction essentially in the language suggested by the appellants.

[16] Objection is made to an instruction limiting the purpose for which evidence of other offenses had been received, telling the jury that it was not to consider that evidence for any other purpose, and telling the jury to view with caution any such evidence. It is not pointed out wherein any error exists, the instruction was beneficial to the appellants, and no prejudice appears.

[17] It is next contended that the court erred in giving an instruction relating to the incident previously described where the appellant Miner was asked by another chiropractor whether or not she was guilty and made no answer. The instruction told the jury that if it should find from the evidence that the appellant Miner, on this occasion, failed to make denial in the face of an accusation expressly directed to her under conditions which fairly offered her an opportunity to reply, and under certain named circumstances, her silence might be considered against her as indicating an admission on her part that the accusation thus made was true. The instruction further pointed out that evidence of any such accusatory statement was not received for the purpose of proving its truth but only to explain the conduct of the accused in the fact of it, and that the entire matter should be disregarded by the jury unless it should find that her conduct at the time indicated an admission that the accusatory statement was true. The only argument made is that the appellants do not consider this as an accusatory statement. The matter was properly left to the jury as to whether or not it was an accusatory statement, with proper instructions as to its necessary elements. People v. Wade, 71 Cal.App.2d 646, 163 P.2d 59; People v. Cooper, 81 Cal.App.2d 110, 183 P.2d 67.

[18] Finally, complaint is made of an instruction on the right of court and counsel to comment on the failure of the appellants to explain or deny any evidence against them. No error is pointed out and the instruction seems to be correct. Art. I, sec. 13, Const.; People v. Platnick, 71 Cal.App.2d 767, 163 P.2d 766.

[19] The evidence does not support the appellants' argument that the only fair inference therefrom is that they were acting as doctors ordinarily act in treating the ills of women, and that there is nothing unusual in the fact that large numbers of women came to their office, which is a situation found in many doctors' offices. It may be observed in this connection that while it may not be unusual for many women to visit a doctor's office, it would hardly be usual, where the purposes are legitimate, for the doctor to cause a fee of $100 to be collected in each case before he sees the patient; to have an appointment made and the patient prepared for the operating table before he sees her; to have the doors locked when the patient goes in; to have a pressure water system surreptitiously installed; to have a device installed so that persons in the office may view those in the reception room without those in the reception room being able to see into the office; and to cancel appointments and close the

office upon the first suspicion that police officers are investigating the place. The evidence clearly supports the verdict, and we find no errors which are sufficiently prejudicial to require a reversal.

The judgment and order, as to each appellant, is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; CARTER, J., dissenting.

96 Cal.App.2d 207

CROSS v. TUSTIN et al.

Civ. 14426.

District Court of Appeal, First District, Division 2, California.

Feb. 24, 1950.

Rehearing Denied March 25, 1950.

Hearing Denied April 24, 1950.

Action by Nancy Cross against John Tustin and others.

From an adverse judgment of the Superior Court in and for the County of Santa Clara, M. G. Del Mutolo, J., plaintiff appealed.

On petition to settle a narrative statement for use on appeal.

The Court of Appeal, Dooling, J., held that it was without power to substitute its conclusion for that of the trial court as to what occurred before the trial court, particularly in absence of a reporter.

Petition denied.

Appeal and error 🔑659(1)

Court of Appeal has no power to substitute its conclusion for that of trial court as to what occurred before that court, particularly in absence of a reporter, and petition to Court of Appeal to settle narrative statement for use on appeal on ground that statement as settled by trial court was incorrect would be denied.

◆

Nancy Cross, Stanford, in pro per.

Howard W. Campen, County Counsel, Harry C. Nail, Jr., Assistant County Counsel, San Jose, attorneys for respondents.

DOOLING, Justice.

The appellant petitions this court to settle a narrative statement for use on her appeal alleging, with supporting affidavits, that the statement as settled by the trial court is incorrect. Under the holding in Burns v. Brown, 27 Cal.2d 631, 166 P.2d 1 this court has no power to substitute its conclusion for that of the trial court as to what occurred before that court, particularly in the absence of a reporter. 27 Cal.2d at page 636, 166 P.2d at page 4 of that case the court said that "when he (appellant) fails to convince the trial judge that his statement accurately reflects the proceedings in question, the action of the trial judge who heard and tried the case must be regarded as final."

Petition denied.

NOURSE P. J. and GOODELL J. concur.

96 Cal.App.2d 61

PEOPLE v. SCHOELLER.

Cr. 4345.

District Court of Appeal, Second District, Division 2, California.

Feb. 10, 1950.

Rehearing Denied Feb. 21, 1950.

Hearing Denied March 9, 1950.

Henry Paul Schoeller was convicted in the Superior Court of Los Angeles County, Walter S. Gates, J., of knowingly keeping false accounts of receipts and disbursements of public moneys, and he appealed.

The District Court of Appeal, Wilson, J., held that the indictment stated an offense and that the defendant as appointed secretary of an irrigation district was subject to prosecution under the statute.

Judgment affirmed.

1. Criminal law 🔑1032(5), 1033(1)
Indictment and Information 🔑196(1, 5)

Objections which appear on the face of an indictment are waived by defendant's failure to demur before plea except want of jurisdiction of court over subject of the indictment or failure to state facts constituting a public offense and may be taken advantage of any time in course of proceedings and raised for the first time on appeal. Pen.Code, § 1012.

2. Officers 🔑122

Indictment charging defendant with violation of statute providing that each officer of a district or any other person charged with receipt, safeguarding, transfer or disbursement of public moneys who knowingly keeps any false account shall be punished, alleging that defendant was the duly and regularly appointed, qualified and acting secretary of an irrigation district and that he willfully, unlawfully, feloniously and knowingly kept a false account and made a false entry in the books of the irrigation district, was not fatally defective in not containing an allegation that defendant was an officer of the state or district therein or that he was a person charged with the receipt, safe-keeping and transfer of public moneys. Pen.Code, § 424.

3. Officers 🔑121

Appointed secretary of board of directors of irrigation district was subject to prosecution under statute providing that any officer of district and every other person charged with "receipt, safe-keeping, transfer and disbursement of public moneys" who knowingly keeps any false account or makes any false entry or erasure of any account shall be subject to imprisonment. Pen.Code, § 424; Water Code, § 20523.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Receipt and Safe-Keeping of Public Moneys".

4. Indictment and Information 🔑1

Purpose of an indictment is to inform defendant of charge which he must meet at trial.

5. Indictment and information 🔑71

Accused is entitled to notice of offense of which he is charged but not to particular circumstances thereof, such details being furnished him by transcript of testimony on which indictment or information is founded.

6. Criminal law 🔑1167(1)

A judgment will not be reversed because of an error in form of indictment unless after an examination of entire cause including evidence, court is of opinion that error complained of has resulted in a miscarriage of justice.

7. Criminal law 🔑1186(4)

Even where an indictment is so defective that a demurrer thereto should have been sustained, if on trial, crime sought to be charged is fully proved, error is not prejudicial. Pen.Code, § 960; Const. art. 6, § 4½.

◆

Ray L. Smith, Wm. C. Schaper, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Frank Richards, Deputy Attorney General, William E. Simpson, District Attorney, Jere J. Sullivan, Richard S. Chapman, Deputy District Attorneys, Los Angeles, for respondent.

WILSON, Justice.

Defendant was charged by indictment with 56 counts of violation of section 424 of the Penal Code. He entered a plea of not guilty to all counts and when the case was called for trial moved to dismiss the indictment upon the ground it did not state a public offense. This motion was denied. After trial by the court, a jury trial having been waived, defendant was found guilty on all counts. His motion for new trial was denied, probation was denied and he was sentenced to the state prison. He has appealed from the order denying a new trial and from the judgment and sentence.

The sole question raised by this appeal is whether the indictment states a public offense.

[1] Respondent asserts that not having demurred before plea was entered and no

motion to set aside the indictment or motion in arrest of judgment having been made, defendant has waived his objections to the form of the indictment. All objections which appear on the face of an indictment are waived by defendant's failure to demur before plea except want of jurisdiction of the court over the subject of the indictment or failure to state facts constituting a public offense. Such may be taken advantage of at any time in the course of the proceedings, People v. Kinsley, 118 Cal.App. 593, 596, 5 P.2d 938; Penal Code, sec. 1012, and may be raised for the first time on appeal from the judgment.

The pertinent portions of section 424 of the Penal Code are as follows: "Each officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys, who either:—* * * 3. Knowingly keeps any false account, or makes any false entry or erasure in any account of or relating to the same; * * Is punishable by imprisonment in the state prison for not less than one nor more than ten years, and is disqualified from holding any office in this state."

Each count of the indictment alleges that defendant was the duly and regularly appointed, qualified and acting secretary of the Palmdale Irrigation District; that he wilfully, unlawfully, feloniously and knowingly kept a false account and made a false entry in the books of the irrigation district.

[2] It is defendant's contention that the indictment is fatally defective in that it does not contain an allegation that he is an officer of the state or of a district therein, or that he was a person charged with the receipt, safe-keeping and transfer of public moneys. This contention is untenable. The indictment alleges that defendant was the "duly and regularly appointed qualified and acting Secretary of the Palmdale Irrigation District, a public corporation." "Secretary" is defined as "Secretary of the board" Water Code, sec. 20523, and defendant admits in his brief that he was appointed secretary of the board of directors in 1933. He asserts, however, that the secretary is not an officer of the district but a mere employee; that the assessor, collector and treasurer are the only officers of the district.

[3] While it may be conceded that the aforementioned officers, together with the board of directors, are the only elective officers, Water Code, sec. 20524, there is nothing in the statute limiting the officers of the district to elective officers. On the contrary, the board of directors has the power to "employ agents, officers, and employees as required" and to "prescribe their duties and fix their salaries." Water Code, sec. 21185. The statute further provides that at its organization meeting the board shall appoint a secretary who shall hold office during the pleasure of the board. Water Code, sec. 21376. Since it is the duty of the board to manage and conduct the business and affairs of the district, Water Code, sec. 21385, the secretary to whom certain of its duties are delegated would be not a mere employee but an officer of the district.

Defendant cites a number of cases in support of his contention that the indictment fails to state a public offense. These cases with but one exception were all decided prior to the 1927 and 1929 amendments, Penal Code, secs. 951, 952, 959, 960, liberalizing the rules governing pleadings in criminal prosecutions. Section 952 of the Penal Code, as amended, provides that the offense may be charged "in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused." Section 960 reads as follows: "No indictment, information, or complaint is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits."

[4–7] The purpose of an indictment is to inform the defendant of the charge which he must meet at the trial. People v. Yant, 26 Cal.App.2d 725, 730, 80 P.2d 506; People v. Codina, 30 Cal.2d 356, 359, 181 P.2d 881. The rule with regard to the sufficiency of an indictment or information under our present simplified form of pleading is laid down in People v. Beesly, 119 Cal.App. 82, 85, 6 P.2d 114, 115, 970, which is cited with approval in People v. Pierce, 14 Cal.2d 639, 645, 646, 96 P.2d 784. As stated in those cases, "the accused is entitled to notice of the offense of which he is charged but not to the particular circumstances thereof, such details being furnished him by the transcript of the testimony upon which the indictment or information is founded." Defendant does not contend the transcript of the evidence given before the grand jury, Penal Code, sec. 925, failed to furnish him with the details which he maintains were omitted from the indictment, nor does he contend the evidence produced at the trial was insufficient to sustain his conviction. The indictment conforms with the requirements of sections 952 and 959 of the Penal Code. Moreover, a judgment will not be reversed because of an error in the form of the indictment "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." People v. Gordon, 71 Cal.App. 2d 606, 611, 163 P.2d 110, 116. As stated in People v. Beesly, supra, 119 Cal.App. at page 87, 6 P.2d at page 116, "Even where an indictment or information is so defective that a demurrer thereto should have been sustained, still, if upon the trial the crime sought to be charged is fully proved, the case falls within the saving grace of section 4½ of article VI of the California Constitution, and of section 960 of the Penal Code, relating to errors in matters of pleading, and the error is not prejudicial."

Judgment and order affirmed. Purported appeal from sentence dismissed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting; EDMONDS, J., not participating.

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96 Cal.App.2d 154

HOTCHKISS v. NELSON R. THOMAS AGENCY, Inc.

Civ. 17278.

District Court of Appeal, Second District,
Division 2, California.
Feb. 20, 1950.

Action by Arch Hotchkiss, Jr., doing business as Universal Engineering Company, against Nelson R. Thomas Agency, Inc., for declaration of rights and duties under exclusive agency contracts.

From a judgment of the Superior Court of Los Angeles County, William S. Baird, J., in favor of the plaintiff, the defendant appealed.

The District Court of Appeal, Wilson, J., held that evidence did not sustain finding that defendant was required to purchase a minimum quantity of merchandise per month, and that oral evidence was improperly admitted as to the understanding of the parties with respect to term of the contracts.

Judgment reversed.

1. Judgment ⚷256(2)

Judgment decreeing that parties were entitled to performance of three contracts was inconsistent with findings that first contract was superseded by second contract and that third contract rescinded second contract and reinstated first contract.

2. Evidence ⚷384, 443

Generally, in absence of ambiguity, written agreement cannot be varied or even explained by parol.

3. Evidence ⚷441(1)

All material oral negotiations regarding terms of contract which is reduced to writing and signed by the parties are presumed to have been included therein.

4. Evidence ⚷428, 448

Statutory exceptions admitting evidence of terms of written agreement did not apply where ambiguity was not put in issue by pleadings nor validity of contracts disputed. Code Civ.Proc. § 1856.

5. Declaratory judgment ⚷347

In action for declaration of rights and duties under agency contracts which appointed exclusive agent for specified territory and required agent to purchase a specified minimum of merchandise per month, evidence was insufficient to sustain finding that there was an absolute requirement that agent purchase the specified minimum, in view of evidence that requirement was treated as a quota which agent must maintain in order to retain its exclusive agency.

6. Evidence ⚷417(9)

Parol evidence cannot be admitted to add another term to an agreement even if the writing contains nothing relating to the particular provision to which the parol evidence is directed.

7. Evidence ⚷417(19)

In action for declaration of rights under agency contracts which contained no provision with reference to their expiration, admission of oral evidence as to understanding between parties with respect to the term, and finding that the contracts were to expire one year from date on which first one took effect, were error.

◆

Dudley Robinson, Los Angeles, for appellant.

Price, Nottbusch, Cory & Schwartz, San Diego, for respondent.

WILSON, Justice.

This is an action for declaratory relief by which plaintiff seeks a declaration of the rights and duties of the parties under three contracts. Defendant appeals from the judgment.

The first of the contracts in question is dated June 1, 1946, and is in the form of a letter addressed to defendant by plaintiff, reading as follows:

"This is to advise that effective June 1, 1946, you are hereby appointed exclusive selling agent of the Ol' Sarge line of gun cleaning equipment and brushes, and Ol' Sarge oil, in the following states: California (Excepting San Diego and Imperial Counties) Washington, Oregon, Nevada, Utah and Idaho.

"We will bill all merchandise shipped to your accounts to you at the current established distributors price, less a selling commission of 10%. Payment of all such accounts will be on terms of 2% 10 days, 30 days net.

"You will be required to purchase a minimum of 5000 rods per month, in such quantities and sizes as may be determined by the ability of the factory to obtain materials. Shipments will be made for your account from our warehouse in San Diego, with full freight allowed on 100# shipments.

"Please acknowledge your acceptance by signing and returning the enclosed copy."

Defendant's signature appears at the bottom of the letter under the words "Accepted By."

The second contract is dated June 18, 1946, and is similar in form to the first, the only variances being that the second agreement specified a different territory and the minimum quota was increased to 30,000 rods per month. By its terms this contract became effective June 1, 1946. It contains the statement that it "supersedes our letter of agreement of June 1, 1946."

The third is an oral agreement entered into on October 14, 1946, wherein the contract dated June 18 was mutually rescinded and the first contract dated June 1 was reinstated.

Defendant admits the execution of the several contracts and their validity at the time of execution. He also admits the first agreement was superseded by the second and that by the oral agreement the latter was mutually rescinded and the first contract reinstated. He contends, however, that the judgment is not in accordance with the findings and that the findings are not supported by the evidence.

The trial court found that the three contracts are valid; that by the oral agreement of October 14 the second contract was mutually rescinded and the first was reinstated; that plaintiff is entitled to the observance and performance of the conditions and provisions of the contract of June 1. The judgment decrees that plaintiff and defendant are "entitled to the observance and performance of those conditions and provisions of the aforesaid contracts, which said conditions and provisions are referred to in the Findings of Fact on file herein."

[1] Since the agreement of June 18 was mutually rescinded and the agreement of June 1 was reinstated by the oral agreement of October 14, the only contract of which the parties are entitled to performance is that of June 1. The judgment and findings are inconsistent to the extent that the judgment decrees that the parties are entitled to the performance of all three contracts, whereas the findings declare that only that of June 1 is in effect.

The court further found that under the agreement of June 1 defendant was required to purchase a minimum of 5,000 rods per month. Defendant contends that there was no obligation upon its part to purchase the minimum but that the quota specified was required to be maintained in order to entitle defendant to continue in exclusive possession of the territory allotted to it.

[2-4] In the absence of an ambiguity the general rule is that the terms of a written agreement cannot be varied or changed or modified or even explained by parol testimony. Gianelli v. Globe Grain & Mill Co., 48 Cal.App. 103, 107, 191 P. 720; Lande v. Southern Cal. Freight Lines, 85 Cal.App.2d 416, 421, 193 P.2d 144. All material previous oral negotiations regarding the terms and conditions of a contract which is subsequently reduced to writing and signed by the respective parties are presumed to have been included therein. Assets Corp. v. Perrin Properties, Inc., 48 Cal.App.2d 220, 228, 119 P.2d 375. The case does not fall within the exceptions of section 1856 of the Code of Civil Procedure since the ambiguity was not put in issue by the pleadings nor was the validity of the contracts in dispute. However, plaintiff seeks a declaration of the rights and duties of the parties under the contracts and the case was tried and argued and is presented on appeal upon the theory that there is a dispute between them as to the construction of the term "you will be required to purchase." It is plaintiff's contention that it should be construed as an absolute obligation upon the part of defendant to purchase the minimum number of rods specified. Defendant contends it was under no obligation to purchase the minimum but that its obligation was only as to the quota it was required to purchase in order to retain its exclusive distributorship.

[5] Plaintiff introduced into evidence, without objection, the deposition of defendant's president, Nelson R. Thomas, taken under the provisions of section 2055 of the Code of Civil Procedure. Mr. Thomas testified as follows: "When you speak of 'purchase,' our only agreement to purchase was when we issued our purchase order. The figure set in the letter was the quota established for maintaining the relationship." He further testified it was his understanding from his conversation with plaintiff that defendant was to purchase a minimum of 5,000 rods per month to maintain the distributorship or selling agency for certain specified states. The above evidence was not contradicted by plaintiff and there is no evidence that the parties themselves interpreted the minimum purchase requirement in the agreement other than as a quota required to be maintained in order that the defendant might continue as exclusive agent for plaintiff's products in the specified territory. Plaintiff testified defendant did not in any one month order the minimum quota. Mr. Thomas testified there was never any discussion with plaintiff about unfilled quotas or any obligation on defendant's part to take goods it had not taken. There is no evidence that plaintiff made any demand upon defendant to purchase its quota and plaintiff testified that in May, 1947, he wrote Mr. Thomas that "it had gone on for some time here now, and that I thought we had better acknowledge the cancellation of any mutual working together in line with distribution, all together, that we had no more orders from him, and that we had to get to work to get distributors." The evidence does not

sustain the finding that there was an absolute requirement that defendant purchase a minimum of 5,000 rods per month under the agreement of June 1, 1946.

[6, 7] The contracts contain no provision with reference to their expiration. The court found that each of them was to expire one year from June 1, 1946. Until the time of trial no question appears to have been raised by the parties as to the duration of the contracts and when plaintiff sought to introduce evidence as to their understanding with reference thereto defendant objected and the objection was overruled. Parol evidence cannot be admitted to add another term to an agreement even if the writing contains nothing relating to the particular provision to which the parol evidence is directed. Harrison v. McCormick, 89 Cal. 327, 330, 26 P. 830, 23 Am.St.Rep. 469; Heffner v. Gross, 179 Cal. 738, 742, 178 P. 860. The trial court erred in admitting oral evidence as to the understanding between the parties with respect to the term of the contracts and in finding and adjudging that the contracts were to expire one year from June 1, 1946.

Judgment reversed.

MOORE, P. J., and McCOMB, J., concur.

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96 Cal.App.2d 72

PEOPLE v. GALENTINE.

Cr. 4408.

District Court of Appeal, Second District, Division 2, California.

Feb. 14, 1950.

Joe Galentine was convicted in the Superior Court of Los Angeles County, Charles W. Fricke, J., of attempted robbery and he appealed from an order denying petition for writ of error coram nobis, judgment of conviction and verdict of guilty.

The District Court of Appeal, McComb, J., held that defendant's notices of appeal from order denying his application for a writ of error coram nobis and from judgment of conviction were not filed within the 10 days allowed by statute and that an appeal would not lie from the verdict of a jury.

Appeals dismissed.

1. Criminal law 🔑1069(1)

Where order denying defendant's application for a writ of error coram nobis was made on May 31, 1949, notice of appeal therefrom filed on June 13, 1949 was not timely. Rules on Appeal, rule 31.

2. Criminal law 🔑1069(1)

Where judgment of conviction of attempted robbery was pronounced on December 26, 1944, notice of appeal filed on June 13, 1949, was not timely. Rules on Appeal, rule 31.

3. Criminal law 🔑1023(10)

An appeal does not lie from the verdict of a jury.

◆

Fred N. Howser, Attorney General, Stanford D. Herlick, Deputy Attorney General, for respondent.

Joe Galentine, in propria per.

McCOMB, Justice.

Defendant appeals from (a) an order denying his petition for a writ of error *coram nobis,* (b) his judgment of conviction of attempted robbery, and (c) a verdict of guilty. Respondent moves to dismiss the appeals on the grounds (1) that the appeals mentioned under (a) and (b), supra, were not filed within the time provided by law, and (2) that the proceeding mentioned in (c), supra, is nonappealable.

This motion must be granted.

[1] (a) The order denying defendant's application for a writ of error *coram nobis* was made on May 31, 1949. The notice of appeal therefrom was filed on June 13, 1949. This was more than 10 days after the order was made. An appeal from the order of the court in a criminal case must be taken within 10 days after the making thereof. (Rule 31, Rules on Appeal, 22

Cal.2d 22; People v. Behrmann, 34 Cal.2d 459, 211 P.2d 575.)

[2] (b) On December 26, 1944, judgment was pronounced on defendant. The notice of appeal was filed June 13, 1949, more than 10 days subsequent to the pronouncement of judgment. Therefore under rule 31, supra, the appeal was taken too late.

[3] (c) An appeal does not lie from the verdict of a jury, hence the purported appeal from the verdict is ineffectual. (People v. Boles, 35 Cal.App.2d 461, 464, 95 P.2d 949.)

The appeals are dismissed.

MOORE, P. J., and WILSON, J., concur.

96 Cal.App.2d 55

PEOPLE v. SCHOELLER.

Cr. 4344.

District Court of Appeal, Second District, Division 2, California.

Feb. 10, 1950.

Rehearing Denied Feb. 21, 1950.

Hearing Denied March 9, 1950.

Henry Paul Schoeller was convicted in the Superior Court of Los Angeles County, Walter S. Gates, J., of appropriating public moneys, and he appealed.

The District Court of Appeal, Wilson, J., held that defendant as appointed secretary of an irrigation district was subject to prosecution for appropriation of public moneys and that the evidence sustained the conviction.

Judgment affirmed.

1. Embezzlement 🔑21

Person appointed by Board of Directors of an irrigation district to position of secretary of board whose duties included all functions ordinarily performed by collector and treasurer with the exception of drawing checks and who acted as deputy collector and signed receipts and documents as an officer of the district was subject to prosecution under statute providing that an officer of a district and every other person charged with "receipt and safe-keeping of public moneys" may be prosecuted for appropriation of such moneys and punished by imprisonment. Pen.Code, § 424; Water Code, 21185.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Receipt and Safe-Keeping of Public Moneys".

2. Embezzlement 🔑44(1)

Evidence sustained conviction of secretary of irrigation district for appropriating public moneys to his own use. Pen. Code, § 424.

3. Criminal law 🔑1159(2)

Before an appellate court may set aside a judgment of conviction, it must appear that on no hypothesis whatever is there sufficient substantial evidence to support it.

Ray L. Smith, Wm. C. Schaper, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Frank Richards, Deputy Attorney General, William E. Simpson, District Attorney, Jere J. Sullivan, Richard S. Chapman, Deputy District Attorneys, Los Angeles, for respondent.

WILSON, Justice.

Defendant and one Fred DeFrenn were convicted on three counts of violating section 424 of the Penal Code. Their motion for new trial was denied. Defendants appealed from the order denying such motion and from the judgment and sentence. Subsequent to the filing of the appeal DeFrenn died and his appeal has been dismissed.

The sole question for determination is whether the evidence supports the conviction. Defendant contends that there is no evidence (1) that he was a "qualified and acting person charged with the receipt, safe-keeping and transfer of public moneys"; (2) "that he had in his possession and under his control in his capacity as an officer of the District chargeable by law, a certain thing of value belonging to the District" and (3) "that he wilfully, unlawfully, feloniously and without authority of law did appropriate said thing of value to his own use thereby making a profit therefrom."

The pertinent portions of section 424 of the Penal Code are as follows: "Each officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safe-keeping, transfer, or disbusement of public moneys, who either:—1. Without authority of law, appropriates the same, or any portion thereof, to his own use, or to the use of another; or, 2. Loans the same or any portion thereof; makes any profit out of, or uses the same for any purpose not authorized by law; * * * Is punishable by imprisonment in the state prison for not less than one nor more than ten years, and is disqualified from holding any office in this state."

Defendant admits that he was secretary of the board of directors of the Palmdale Irrigation District but asserts that in such capacity he was not an officer of the district but a mere clerk in its employ; that the only officers of the district are the treasurer, collector and assessor, who are elective officers; that he received no compensation for acting as secretary; he had no power to draw checks and he was never sworn in as an officer of the district, nor did he post any bond.

Defendant testified he was first employed by the Palmdale Irrigation District in June, 1926, as an engineer; he was elected secretary of the board about 1933; he took care of all collections, with the assistance of the women in the office, signed receipts, papers and documents as deputy collector; performed the services of both secretary and collector; he made bank deposits but did not sign checks; bills were paid by a warrant drawn on the treasurer signed by the president and secretary of the board and the treasurer issued a check; the collector and treasurer did nothing.

Mr. McBride testified he was elected treasurer in 1930 and was also the collector; he had nothing to do with collection or recording of collections; he prepared no financial statements, handled no funds and kept no books or records; his only duty consisted of signing the checks when they were presented with the voucher attached signed by the secretary and the president of the board; he had never in the seventeen years he had been in office prepared a collector's or a treasurer's report.

[1] In addition to the three elective officers provided for by statute the board of directors of an irrigation district has the power to "employ agents, officers, and employees as required" and to "prescribe their duties and fix their salaries." Water Code, sec. 21185. The board appointed defendant to the office of secretary of the board and his duties included all those functions ordinarily performed by the collector and treasurer, with the exception of drawing checks. He acted as deputy collector and signed receipts and documents as an officer of the district, presumably with the consent and approval of the board of directors. Defendant was not only an officer of the district but he was also charged with the receipt and safe-keeping of public moneys.

The three transactions involved in the indictment are as follows:

The O'Neill Transaction. In March, 1943, the O'Neills purchased some property from Mr. Walters. Walters was indebted to the district for delinquent assessments and this obligation the O'Neills assumed as part of the purchase price. They executed a promissory note to the district for $1,000, secured by a deed of trust. The O'Neills made one interest payment to the district and prior to the time the second payment became due defendant told Mrs. O'Neill that Mr. DeFrenn had purchased the paper and to make future payments to him. Defendant also advised Mr. O'Neill to the same effect whereupon O'Neill requested a letter from the district that such was the case. Defendant said he would send the letter but failed to do so. The O'Neills made two interest payments to DeFrenn. When the principal payment became due defendant told the O'Neills to make their payments to the district. The balance of the principal and interest payments were made to the district. DeFrenn was a director of the Palmdale Irrigation District. The O'Neill note was assigned to DeFrenn's wife on January 6, 1944, the endorsement on the note being signed "Palmdale Irrigation District, H. P. Schoeller, Sec'." The note was subsequently reassigned to the district by Norine DeFrenn. In the cash received record of the district under date of January 6, 1944, is an entry reading "J. F. O'Neill (Bal. on Walters purchase) $800.00." Above the entry is written the words "advance on loan" in different colored ink and written at a different time. The foregoing entry was offset by a cash disbursement of $800 in January, 1945, by a check payable to Norine DeFrenn. It is defendant's contention that DeFrenn loaned the district $800 and the O'Neill note was assigned to him for security. There is, however, nothing in the minutes of the board of directors concerning the transaction and defendant admitted that in accepting the check for $800 from DeFrenn he was not doing so under any authority granted by the board. DeFrenn likewise had no recollection that the matter of his loaning money to the district was ever discussed by the board of directors. The district did not execute any note to DeFrenn as evidence of the loan. From the foregoing it must be concluded that the evidence was sufficient to find defendant guilty of selling the O'Neill note to DeFrenn for $800 and that defendant and DeFrenn appropriated the O'Neill trust deed note to their own use and benefit and for a purpose not authorized by law.

The Winter Transaction. In April, 1943, an escrow was entered into between Mr. and Mrs. Winter and the Palmdale Irrigation District whereby certain property belonging to the Winters was exchanged for property owned by the district. In addition to executing a deed to the district covering the real property conveyed by them, the Winters also executed a promissory note in the amount of $1300 in favor of the district, secured by a deed of trust, which note represented the difference in the value of the two pieces of property. The escrow instructions were signed "Palmdale Irrigation District, by H. P. Schoeller, Secretary." On June 14, 1943, the Winter note was assigned to Norine DeFrenn, the endorsement being signed: "Palmdale Irrigation District By Fred DeFrenn, President, H. P. Schoeller, Secretary." On the same date DeFrenn gave the district his check for $1,000. The check was deposited to the credit of the district but the receipt was not recorded in the books. The Winter note was subsequently paid in full to DeFrenn. The minutes of the board of directors of the district under date of March 3, 1943, contain the following entry: "Mr. Frank Winters requested that the District deed him the 12 acres in lot 3, tract 7682 and take a deed from him on his five acres in alfalfa and a trust deed for a cash payment of $1,000." The words "trust deed for" are crossed out in the minutes. It is defendant's contention that he knew nothing about the Winters matter except a memorandum given to him at the board meeting calling for $1,000 for the transfer of the property; that Winter did not have the necessary $1,000 and wanted time payments; that the district was not a party to the escrow and the note and deed were erroneously sent to the district and it was therefore necessary to assign them to DeFrenn. The evidence refutes defendant's contentions. The district was a party to the escrow and the defendant signed the instructions which contained a valuation on each piece of property, the difference between the two being $1300.

The Bright Transaction. Mr. and Mrs. Bright discussed with defendant and DeFrenn the purchase of property in the district. On May 6, 1946, Mrs. Bright made a down payment of $200 on the transaction. The escrow was handled by the Sipherd Service. The escrow instructions were not signed by any of the parties and the matter was handled by Sipherd upon the verbal instructions of defendant. On June 27, 1946, three deeds were recorded covering the same piece of property; (1) deed dated May 6, 1946, from Palmdale Irrigation District to Robert Sargent and Alice Sargent, executed by defendant as secretary and DeFrenn as president of the district; (2) deed dated May 7, 1946, from Lester Bright and Francis Bright to Title Insurance and Trust Company with Fred DeFrenn and Norine DeFrenn as beneficiaries, to secure a promissory note in the amount of $300 executed by the Brights and payable to the DeFrenns; (3) deed dated May 10, 1946, from Robert Sargent and Alice Sargent to Lester Bright and Francis Bright. Defendant gave Sipherd the $200 check of the Brights and at the close of escrow Sipherd sent the district a check for $172.05 with a statement of the escrow charges. Sargent is defendant's brother-in-law. He advanced no money to the district in the transaction and received no money. He testified that he and defendant had a working agreement in relation to defendant's buying for his account; that prior to the Bright deal he owed defendant $1,000 on prior deals; that the arrangement he had with defendant was that he (defendant) would finance the deal and Sargent would pay on demand; that after this purchase he owed defendant an additional $200 and got credit for the $300 "we profited." There is no record in the cash receipt ledger of the receipt of $200 from Sargent. There is no record in the minutes of any resolutions by the board of directors concerning the sale of property to either Sargent or Bright. DeFrenn paid defendant $300. The Brights paid $500 for the property, borrowing $300 from DeFrenn, but the district received only $172.05 on the transaction. Defendant contends that the district was not a party to the transaction; that Sargent purchased the property from the district and subsequently sold it to the Brights for $500. The very fact that the entire transaction was handled in one escrow at the same time is sufficient answer to such a fallacious argument.

[2, 3] The evidence is sufficient to sustain the conviction on each count. "Before an appellate court may set aside a judgment of conviction it must appear that upon no hypothesis whatsoever is there sufficient substantial evidence to support it." People v. Klinkenberg, 90 Cal.App.2d 608, 626, 204 P.2d 47, 58; People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

Judgment and order affirmed. Purported appeal from sentence dismissed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting; EDMONDS, J., not participating.

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96 Cal.App.2d 101

HAGAN v. MUND'S BOILERS, Inc.

Civ. 17285.

District Court of Appeal, Second District, Division 1, California.

Feb. 17, 1950.

Rehearing Denied March 6, 1950.

Hearing Denied April 17, 1950.

J. A. Hagan, doing business as El Rey Cheese Company, sued Mund's Boilers, Inc., either for rescission of contract for purchase of boiler from defendant and return of purchase price or to recover damages for breach of the contract.

An amended judgment making payment of money judgment in favor of plaintiff conditional upon return to defendant of the boiler was entered by the Superior Court of Los Angeles County, Carl A. Stutsman, J., and the plaintiff appealed.

The District Court of Appeal, Doran, J., held that trial court was without power to set aside the original money judgment in favor of plaintiff and to substitute therefore amended judgment.

Amended judgment reversed with directions.

1. Judgment 🔑305, 306

A court may amend a judgment to make it conform to the decision actually rendered, and may correct clerical errors or misprisions, as distinguished from judicial errors. Code Civ.Proc. § 473.

2. Judgment 🔑294

Proceedings for amendment of judgments should not be permitted to become revisory or appellate in their nature, and ought not be the means of modifying or enlarging judgment or judgment record so that it shall express something which court did not pronounce, even though proposed amendment embraces matter which clearly could or even should have been pronounced. Code Civ.Proc. § 473.

3. Judgment ⚿338

The statute permitting relief from a judgment taken against party through his mistake, inadvertence, surprise or excusable neglect is entitled to a reasonably liberal construction, but statute was not intended as a substitute for an appeal or other remedial provisions designed to assist a party who is dissatisfied with judgment rendered against him. Code Civ. Proc. § 473.

4. Judgment ⚿363

Where money judgment for plaintiff failed to show whether it was rendered on theory of rescission of contract for purchase of boiler, or on theory of affirmance thereof and damages, defendant, upon statement of its counsel, without any showing of trial judge's personal recollection of the matter, was not entitled to have original judgment set aside on ground of mistake, inadvertence, surprise or excusable neglect after time for appeal therefrom had expired, and amended judgment substituted making payment of the money judgment conditional upon return of boiler to defendant. Code Civ. Proc. § 473.

Jesse A. Hamilton, Los Angeles, for appellant.

Paul Gordon, Melvin E. Fink, Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from an amended judgment entered by the trial court on November 24, 1948, pursuant to notice served on the plaintiff-appellant, and superseding an original judgment entered July 13, 1948 after a trial without jury. The question raised on this appeal is in reference to the trial court's power to set aside the original judgment and to substitute therefor a new and different decision making payment of the money judgment conditional upon a return to defendants of a boiler sold to the plaintiff.

The controversy herein arose out of a sale by respondents to appellant of "one 15 Horse Power Mund Automatic Boiler" which according to the complaint, respondent corporation had "warranted and guaranteed * * * would produce a low moisture or dry steam which could be injected in cheese to be processed by plaintiff". The price alleged to have been paid by appellant was $1,674.51.

Appellant's complaint, entitled "Complaint for Recission of a Contract", is in three counts. The first count sets up the terms of the sale, alleges notice of recission, and seeks repayment of the purchase price. A second count is for the recovery of $500 expended in making adjustments and repairs recommended by the seller; the third count asks $5,000 in damages resulting from appellant's inability "to manufacture and produce processed cheese and cheese foods, and lost sales thereof", because of the defective boiler furnished. The answer admits the sale of the boiler but is otherwise a general and specific denial that there was any rescission, any liability, or any damage.

The trial court found that the boiler was furnished and warranted as alleged; that appellant paid $1,511.88 for the same; that the apparatus did not produce steam sufficiently dry for cheese processing. The court then concluded "That the plaintiff is entitled to judgment against the defendant, Mund Boilers, Inc. * * * for the sum of $1,011.88", and judgment was rendered accordingly. The theory on which the judgment was rendered does not appear of record, nor does it appear how the court arrived at the amount of the judgment. It will be noted, however, that the decision is but a plain money judgment in favor of appellant without any conditions to be fulfilled by appellant. Neither minute entry, findings, conclusions or judgment suggest that it was contemplated that appellant should return the boiler purchased.

Thereafter a thirty day stay of execution was granted, and a motion for a new trial was argued and denied. After the expiration of the statutory time for appeal from the original judgment, a further stay of execution was secured ex parte, and respondents filed a motion to vacate the judgment on the ground of "mistake, inadvertence, surprise or excusable neglect" under Section 473 of the Code of Civil Procedure. Supporting this motion is an affidavit by one of respondents' attorneys stating that at the trial the Court rules "that the Defendants were entitled to the return of the * * * boiler. * * * That said proposed judgment so prepared by said plaintiff (and signed by the court) failed to provide for the return or redelivery of said * * * boiler". The affidavit then avers that said attorneys "relying on the plaintiff's understanding of said ruling and upon said plaintiff's sense of fairness, equity and justice, did not require that the judgment provide for the return of said boiler". When defendants tendered the amount of the judgment, plaintiff refused to return the boiler since the judgment contained no such requirement.

The respondents therefore petitioned the trial court, under the authority of said Section 473, for the vacation of the original judgment "and the entry of a new judgment", requiring appellant to return the boiler "in the condition the same was on or about the 10th day of October, 1946, reasonable wear and tear from ordinary use thereof since that date excepted". This relief was granted to the respondents, and on November 24, 1948, such an amended judgment was signed by the trial court.

It is appellant's contention that no error was committed by the court in entering the original judgment which it is argued, is consistent with the findings; that if any error was committed, it was judicial and not clerical in nature and could not be corrected by making payment of the judgment conditional upon plaintiff's return of the boiler, after time for appeal had expired. Appellant's briefs further aver that there was no "mistake, inadvertence, surprise or excusable neglect", within the meaning of Section 473 of the Code of Civil Procedure. It is further pointed out that the amended judgment requiring return of the boiler "in the condition the same was on or about the 10th day of October, 1946, reasonable wear and tear from ordinary use thereof since that date excepted", is too uncertain for enforcement, and can only lead to another lawsuit.

The respondents' position is that "The Court, under its inherent power to include a matter inadvertently omitted from a judgment, can enter an amended judgment", and that under Section 473, a remedial provision to be construed liberally, the trial court properly amended the judgment to promote the ends of justice. Respondent deems the omission in the original judgment a clerical rather than a judicial error.

Unfortunately, the record herein throws but little illumination upon the question in controversy. The minute order recording the granting of defendants' motion to vacate the original judgment merely states that the motion is granted. No amendment to the original findings was suggested, ordered or made.

The amended judgment, subject to attack herein, merely recites that the original judgment is vacated, "it satisfactorily appearing * * * that the said judgment was rendered against said defendant by reason of his surprise, inadvertence and excusable neglect". The record nowhere contains any statement by the trial judge as to the circumstances surrounding the entry of the original judgment other than that just quoted. The personal recollection of the trial judge as to this important matter is not recorded.

All that is clear is that the original minute order, findings and conclusions, and the original judgment itself, make no mention of a return of the boiler to defendants, and attach no conditions whatsoever to the payment by defendants to plaintiff of the money judgment. Whether this original money judgment was rendered on the theory of rescission of the contract, or on the theory of affirmance thereof and damages, or how the trial court arrived at the amount of the judgment are questions upon which the record throws no light.

[1, 2] The rule, as stated in 14 Cal.Jur. pages 993-1000, is that a court may in a proper case, amend a judgment "to make it conform to the decision actually rendered", and may correct "clerical errors or misprisions, as distinguished from 'judicial' errors." Nevertheless, "Proceedings for the amendment of judgments should not be permitted to become revisory or appellate in their nature, and ought never to be the means of modifying or enlarging the judgment or the judgment record so that it shall express something which the court did not pronounce, even though the proposed amendment embraces matter which clearly could or even should have been pronounced".

The statement last quoted is particularly applicable to the present situation. If the defendants were dissatisfied with the original judgment, the remedy of appeal was available. The alleged objectionable features of the original judgment must have been as apparent when that judgment was rendered and entered as they were some four months later.

Moreover, a motion for new trial was made, argued and denied. As commented on in appellant's brief, among other grounds for a new trial, defendants alleged that the evidence and findings were insufficient to justify the judgment; that the judgment was against and contrary to law; and that the court had wrongfully refused "to amend the findings as requested by said defendant". Again it may be said that any objection to the judgment must have been fully apparent to respondents at that time.

If the modification of the judgment in the present case is to be deemed the correction of a mere "technical" error, as respondents contend, it is difficult to imagine what a "judicial" error might be. Certain it is that no adjudicated case on this subject has gone so far as to justify the amendment here made. When it is considered that the purport of the original judgment and of the findings supporting it, was to give the plaintiff an unqualified money judgment of $1,011.88, and that, after time for appeal had expired, the trial court at defendant's suggestion modified such judgment by attaching thereto a condition that plaintiff return the boiler to defendants, it will be seen that the amendment was anything but "technical" in nature. Rather, the amendment completely changed the complexion of the judgment.

The case of Bastajian v. Brown, 19 Cal. 2d 209, 120 P.2d 9, 12 has been cited as justifying the present amendment. The facts, however, are in no manner similar to those here presented. In that case the record disclosed that a minute order was made shortly after the trial of the case in which judgment was ordered for defendants; later, through some inadvertence findings and judgment were signed which were completely contrary to the judgment ordered. In setting aside the judgment the trial judge declared that the findings and judgment signed "do not conform to and set forth the true judgment rendered by the court". The reviewing court took the view that the error was a clerical one which it was proper for the trial court to correct.

In Morgan v. State Board of Equalization, 1949, 89 Cal.App.2d 674, 201 P.2d 859, 864, the court, while recognizing the power to correct "clerical" errors, nevertheless holds that where a judgment denying a writ of review had been entered and the record discloses no clerical error, the court had no power to render a subsequent judgment or order discharging the writ and thereby correct judicial errors in the first judgment. In this case the reviewing court said that "where the amendment is substantially different from the original order or substantially changes the rights of the parties * * * if the court is purporting to correct a clerical error, it should say so, or there should be something in the record to show it."

[3] While it is doubtless true that such a statute as Section 473 of the Code of Civil Procedure, permitting relief "from a judgment * * * taken against him

through his mistake, inadvertence, surprise or excusable neglect", is entitled to a reasonably liberal construction, such principle cannot, under the circumstances herein disclosed, furnish an excuse for such a drastic amendment as that here involved. Section 473 was never intended as a substitute for an appeal or other remedial provisions designed to assist a party who is dissatisfied with a judgment rendered against him.

[4] In the instant case, the record discloses no indication of any such mistake, etc. contemplated by the section other than the bare statement of respondent's counsel. On the contrary, as mentioned in appellant's brief, "The record shows that at every point in the proceedings * * * respondent was ably represented by counsel, that at every point mentioned the court was consistent in carrying out its original judgment in spite of the fact that various objections were raised thereto; certainly there was no mistake, inadvertence, surprise or neglect present here".

The amended judgment is reversed with directions to reinstate the judgment originally entered.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; SHENK and SPENCE, JJ., dissenting.

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96 Cal.App.2d 187

EVANS et al. v. SUPERIOR COURT IN AND FOR SAN BERNARDINO COUNTY et al.

Civ. 4132.

District Court of Appeal, Fourth District, California.

Feb. 21, 1950.

Hearing Denied April 20, 1950.

Proceeding in prohibition by Maybelle Cox Evans and another, petitioners, against the Superior Court of the State of California, in and for the county of San Bernardino, Hon. A. D. Mitchell, Judge thereof of Department Three, and another, to restrain further proceedings in the Superior Court of a criminal case.

The District Court of Appeal, Barnard, P. J., held that under statute making the receipt of a bribe by prospective witness a felony, the receipt of a bribe by prospective witness during period between commitment and filing of information constituted an offense.

Writ denied.

1. Obstructing Justice 🔑**4**

Under statute making receipt of bribe by one who is about to be called as a witness a felony, alleged receipt of bribe on July 2, 1949 by prospective witness in case wherein defendant had been committed to custody after preliminary examination constituted an offense, though information in the case was not filed until July 8, 1949. Pen.Code, §§ 138, 809.

2. Obstructing Justice 🔑**4**

A "proceeding" normally leading to a "trial" is pending during the interval between filing of commitment order and filing of information, for purpose of charging a violation of statute which makes the receipt of a bribe by one who is about to be called as a witness in a trial or proceeding, a felony. Pen.Code, § 138.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Proceeding".

Maybelle Cox Evans and Wardwell D. Evans, in pro. per.

Jerome B. Kavanaugh, District Attorney, Theo. G. Krumm, Chief Deputy District Attorney, San Bernardino, for respondents.

BARNARD, Presiding Justice.

This is an application for a writ of prohibition, brought under section 999a of the Penal Code.

On June 27, 1949, a preliminary examination was held in the justice's court of San Bernardino Township, in the case of The People v. Paul Sorenson, in which the defendant was charged with pimping and pandering. The court made an order holding the defendant to answer, ordering him committed to the custody of the sheriff, and fixing bail. Admittedly, this order, with the complaint upon which it was indorsed, was immediately delivered to the clerk of the superior court, and an information based upon said order was filed in that court on July 8, 1949.

On December 2, 1949, an information was filed in the superior court charging the petitioners herein with a violation of section 138 of the Penal Code. It was charged that on July 2, 1949, they offered to receive and did receive a bribe of $100 upon an understanding and agreement that Maybelle Cox Evans would not attend upon the trial and hearing of the case of People v. Sorenson, then pending in the superior court, she being a person about to be called as a witness in that action and proceeding. On December 9, 1949, these petitioners moved, under section 995 of the Penal Code, to have this information set aside on the ground that they had been committed without reasonable or probable cause. This motion was denied and the cause set for trial. Petitioners then applied to this court for a writ prohibiting further proceedings in that matter.

The sole contention here made is that no action against Paul Sorenson was "pending" in the superior court on July 2, since the information was not filed until July 8, and that anything done on July 2 by the petitioners could not have constituted a violation of Section 138. It is argued that since no such action was pending on July 2, Maybelle Cox Evans could not then have been a person about to be called as a witness in said action or proceeding, as charged in the information.

In support of this contention petitioners rely upon the case of People v. Thompson, 84 Cal. 598, 24 P. 384. That case involved the admissibility into evidence of a conditional deposition taken pursuant to the provisions of section 879 and 882 of the Penal Code. Under these provisions such a deposition could be taken only when certain things appeared to the satisfaction of the Judge of the court in which "the action is pending." It was held that these conditions were not met and that no action was pending in that court when the deposition was taken, since neither a valid information nor any commitment of any kind from the committing magistrate had then been filed in the superior court. It was, therefore, held that at the time the deposition was taken there was nothing before the superior court which gave it jurisdiction to try the defendant.

In the instant case, it appears that a valid order holding the defendant to answer in the case of People v. Paul Sorenson, had been filed in the superior court on June 27, 1949. The district attorney had fifteen days thereafter in which to file the information. Penal Code, Sec. 809. Whether it may be said, technically, that an action is pending in the superior court in the interval between the filing of the holding and commitment order and the filing of the information, there is at least an existing "proceeding" which is preliminary to, and which normally leads to, a "trial."

Section 138 of the Penal Code is not, by its terms, specifically made applicable only where an action in a particular court is actually pending. It refers to one "who is a witness, or is about to be called as such." While it refers to the "trial or proceeding" upon which the person's testimony is required this reference is general and there is no express limitation confining it to an action that is actually pending.

In People v. McAllister, 99 Cal.App. 37, 277 P. 1082, 1084, in discussing Section 137 of the Penal Code, the court said:

> "At the outset it must be remembered that this is a law primarily to prevent the corrupt interference with the administration of justice. Its purpose is to go back as far as necessary and say, in effect, that any attempt to so influence prospective witnesses that the truth will not be presented in an anticipated litigation is felonious. * * *. True, a person cannot be a witness, unless there is an action pending, but a person may be about to be called as a witness, even though no action is pending. * * * No reason is suggested, nor is one apparent why it should be unlawful to attempt to bribe or otherwise persuade someone to later defraud the court as a

witness, if the attempt be made while an action is pending, but, if the same effort to obstruct justice were used just before the action was begun, it should be exempt from condemnation and entitled to the approval and sanction of the law.

"The term 'or person about to be called as a witness' in the first part of the section, it seems clear, was used with the legislative intent of including within its denouncement all offers of bribes to any person in contemplation of his becoming a witness."

In the respect here in question we see no material difference between the effect of section 138 and that of section 137. Each section covers the influencing or withholding of "testimony," a thing which relates to some trial or proceeding. While section 138 mentions a "trial" it has no such limiting word as "pending," and the language is broadened to include a "proceeding." Section 137 covers the giving of a bribe, and section 138 the receiving of a bribe. No good reason appears for assuming that the legislature intended to make the one applicable where no case was actually pending, and to make the other inapplicable unless an action was then pending. There is even less reason to believe it was intended to make the acceptance of a bribe unlawful if it occurred immediately after an information was filed, but to relieve it from the effect of the statute if it occurred after the filing of the holding order but before an information could be filed. We think that such a race as is thus suggested was neither invited nor intended.

[1, 2] A holding order had here been filed, before July 2, and at least a proceeding was then pending in the superior court in the Sorenson matter. It is not questioned that Maybelle Cox Evans was a material witness in that proceeding, or that her testimony would be further required before that proceeding was completed. It sufficiently appears that the acts here charged constituted an offense within the meaning of section 138.

The alternative writ is discharged, and the petition for a peremptory writ is denied.

GRIFFIN and MUSSELL, JJ., concur.

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96 Cal.App.2d 94

DOWNEY v. MARTIN AIRCRAFT SERVICE, Inc.

SHACKFORD v. MARTIN AIRCRAFT SERVICE, Inc.

Civ. 17202, 17201.

District Court of Appeal, Second District, Division 1, California.

Feb. 17, 1950.

Hearing Denied April 17, 1950.

Actions by W. W. Downey and by Bartlett C. Shackford against the Martin Aircraft Service, Inc., alleging that defendant failed to deliver possession of certain airplanes on demand.

The Superior Court for Los Angeles County, Joseph M. Maltby, J., rendered judgments for defendant, and plaintiffs appealed.

The District Court of Appeal, White, P. J., held that the burden was on defendant as bailee to show that the property was lost in a fire without defendant's negligence. The court also held that bailments had been proved and that no formal demands for return of the property were necessary.

Judgments reversed.

1. Trial ⚷139(1), 178

Upon motion by defendant for a directed verdict, power of the court is the same as upon a motion for nonsuit; and such a motion must be denied if there be any substantial evidence which would support a verdict for the plaintiff had such verdict been given.

2. Bailment ⚷31(1)

When bailee under duty of exercising ordinary care is unable to redeliver subject of bailment, it is not enough for him to show that property was lost, stolen or destroyed, but if he relies upon such fact to excuse his failure, he must show that loss occurred without negligence on his part.

3. Bailment ⚷14(1)

Where owners paid monthly fees for privilege of storing airplanes in hangar and on field outside, and planes were in hangar at time of fire for purpose of repairs undertaken by hangar owner and for checking, hangar owner had possession of planes as a bailee.

4. Bailment ⚷26

Where owners of airplanes destroyed in hangar fire in the one case saw plane after total destruction, and in the other took possession of wreckage, demands for return of planes were not necessary prior to bringing of actions against hangar owner as bailee for failure to redeliver planes.

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Edison J. Demler, Stephen A. Pace, Jr., Long Beach, for appellants.

Forrest A. Betts, Walter Ely, Betts, Ely & Loomis, Los Angeles, for respondent.

WHITE, Presiding Justice.

Each of the plaintiffs and appellants herein was the owner of an airplane which was stored in the hangar of the defendant and respondent. On January 14, 1948, the hangar caught fire and the planes of plaintiffs were severely damaged. The plaintiffs each brought an action, alleging that defendant failed to deliver possession of the planes to plaintiffs upon demand, to their damage. At the trial, after the plaintiffs' testimony had established the foregoing facts, both parties rested and moved for a directed verdict. The trial court granted defendant's motion, and from the judgment entered on the directed verdict plaintiffs appeal.

The pertinent allegations of plaintiffs' respective complaints were that "plaintiff, at the special instance and request of the defendants, and each of them, placed the above mentioned airplane in the possession of the defendants, and each of them, as bailees for the purpose" (as to plaintiff Downey, of making and performing certain repairs, and as to plaintiff Shackford, of storage); "* * * that said defendants did accept said airplane * * * and promise and agree to surrender, deliver up and return said airplane to plaintiff upon his demand; that as a consideration therefore said plaintiff did agree, promise and covenant to pay to said defendants (the costs of making and performing the repairs) (a sum of money for the storage). * * *."

It was further alleged that each plaintiff, on or about January 15 or 16, 1948, offered to pay for the storage, or repairs, as the case might be, and demanded the return of his airplane, but that the defendants failed and refused to return the same, to his damage.

The answer in each case was a denial of the allegations above set forth. No affirmative defense was alleged.

Upon the trial plaintiff Dr. Shackford testified that his Stinson plane was kept at the hangar of defendant, Martin Aircraft Service, Inc., and that he paid a hangar rental of $25 per month; that he had flown the plane on the day of the fire to test the tail wheel assembly, which defendant had been repairing; that on the afternoon of the 14th of January, 1948, after landing the plane and filling the gasoline tanks, Dr. Shackford and one of defendant's employees pushed the plane into the hangar. On the morning of the 15th of January, after the fire, he came to the airport and identified the burned metal remains of the plane.

It was alleged in the complaint that plaintiff Shackford had demanded the return of the plane. On cross-examination he testified:

"Q. You allege in your complaint, Dr. Schackford, in substance, that you made a demand—and this is purely legal language, I suppose—that you made a demand on Mr. Martin to deliver your plane to you and that he refused to deliver your plane to you; and now from the standpoint of strict accuracy and truth you didn't ever ask him to deliver your plane to you, did you? A. I suppose that is a technical way of phrasing it. Frankly, I went out and saw that there wasn't any plane to be delivered to anybody.

"* * * You didn't demand, after you saw your plane there burned to a cinder, for him to deliver it to you in the condition you left it? A. That is right. * * *

"And he didn't refuse to deliver it to you, did he? A. No, I should say that I didn't know that question would come up.

"Q. I mean, it was obvious to you the next day when you went out there that redelivery to you of your ship was a practical impossibility. A. That is correct. * * *

"Q. You didn't know what caused it (the fire)? A. No.

"Q. Nobody else did as far as you knew? A. Not to my knowledge."

Mr. Downey, owner of the other plane, testified that his plane was stored on defendant's field, but not in the hangar, and in addition to storage, he paid for maintenance and repairs; that at the time of the fire the plane was in the hangar and in possession of defendant for the purpose of recovering the control surfaces. He was in the vicinity at the time of the fire and saw his plane consumed. He testified:

"Q. Did you, after the fire, after you saw your ship destroyed, ask him to deliver that particular ship back to you in the condition it was before the fire? Now, you can answer that question yes or no. A. I asked him to deliver the airplane. I didn't ask him to deliver it in the condition it was before the fire because I knew it was impossible. * * *

"Q. You knew the airplane had been destroyed. A. Yes, I did.

"Q. By a fire of unknown origin, didn't you? A. That is right."

After this testimony on the part of the plaintiffs, both sides rested and each made a motion for a directed verdict. The trial court pointed out that the plaintiffs' evidence disclosed destruction of the subjects of the bailments by a fire of unexplained origin and stated that the question was "whether destruction by fire unexplained would shift the burden of proof over to them (defendant) to prove that they were not negligent." The court then concluded that the action sounded in conversion and not in contract, and that there could be no recovery for conversion because there was no proof of an act of dominion wrongfully exerted. A verdict was thereupon directed for the defendant.

[1] Whether the instant action sounded in conversion or for breach of contract of bailment is not controlling. The allegations of the complaints support either theory. It cannot be disputed that under the evidence a bailment existed. Upon motion by a defendant for a directed verdict, the power of the court is the same as upon a motion for a nonsuit. Such a motion must be denied if there be any substantial evidence which would support a verdict for the plaintiff had such verdict been given. The true question here presented is: When suit is brought against a bailee for hire for his failure to return the subject of the bailment, and it appears that the subject of the bailment has been destroyed (or lost, or stolen) while in the possession of the bailee, is the burden upon the bailee to show that the loss was not due to his failure to exercise ordinary care, or is the burden upon the plaintiff to establish such lack of ordinary care? If the burden is upon the plaintiff, he will be faced in many cases with insuperable difficulties in securing and presenting evidence. To place the burden on the defendant is in effect to hold that loss or destruction of the property, unexplained, warrants an inference that ordinary care was not exercised.

Prior to the adoption of the Warehouse Receipts Act, Stats.1909, p. 437, Deering's Gen.Laws, Act 9059, the decisions in this state as to the burden of proof when goods stored with a defendant have been lost or destroyed were conflicting and confusing. See discussions in George v. Bekins Van & Storage Co., 33 Cal.2d 834, 839, 840, 205 P.2d 1037, and Wilson v. Crown Transfer Co., 201 Cal. 701, 706, 707, 258 P. 596. Section 8 of the aforesaid act provides that if a warehouseman fails to deliver the goods in compliance with a proper demand, the burden shall be upon him to establish the existence of a lawful excuse for such refusal. The Supreme Court, in the case first above cited, rejected the contention of defendant that a showing that the goods were destroyed by fire established a lawful excuse and placed the burden of proving negligence upon the plaintiff. Quoting from the opinion, 33 Cal.2d at page 840, 205 P.2d at page 1042: "Although the court in the Crown Transfer case recognized that the cases decided before the adoption of the uniform act had been reconciled on the basis of the pleadings, it did not intend to make the burden of proof in cases involving storage contracts governed by the uniform act turn on whether plaintiff chose to allege only the contract and its breach instead of alleging that while stored under contract the goods were destroyed as a result of defendant's negligent custody. Thus the court disapproved dicta in Runkle v. Southern Pacific Milling Co., 184 Cal. 714, 195 P. 398, 16 A.L.R. 275, and Atwood v. Southern California Ice Co., 63 Cal.App. 343, 218 P. 283, that the burden of proof on the issue of negligence was on plaintiff, although in the Runkle case plaintiff had adopted a negligence theory in his complaint, and in the Atwood case he had sued on the theory of conversion. It is clear, therefore, that *in cases governed by the provisions of the uniform act,* the burden of proving that the goods were not lost because of negligence is on the defendant, *whether plaintiff frames his complaint on a negligence or a breach of contract theory.*" (Emphasis added.)

It might possibly be assumed, in view of the language used in the two cases above cited, that the rule placing the burden of proof on the defendant bailee applies only in cases arising under the Warehouse Receipts Act, where the language of the act leaves no room for doubt. However, the question of what the rule might be when the Warehouse Receipts Act is not applicable was not before the court in either of the two cases. The logic of the rule would seem to be as much applicable to a garagekeeper, parking-lot operator, or person who accepts a chattel for purposes of repair, as it is to a warehouseman. In either case the party has undertaken, for reward, to use ordinary care in the safekeeping of a chattel.

Wilson v. Crown Transfer etc. Co., supra, admittedly based upon the Warehouse Receipts Act, was decided in 1927. George v. Bekins Van & Storage Co., supra, was decided in 1949. In 1938 the Supreme Court denied a hearing in Travelers Fire Ins. Co. v. Brock & Co., 30 Cal.App.2d 112, 114, 85 P.2d 905, 906, decided by Division Two of this court. In that case a brooch was entrusted to the defendant for repair. The defendant in turn delivered the brooch to a diamond cutter for the purpose of fitting a diamond to the brooch. The brooch was stolen from the diamond cutter, and in an action to recover the value of the brooch, defendant Brock & Co. offered to prove that the reputation of the diamond cutter was such and his precautions were such that Brock & Co. could not be considered negligent in entrusting the brooch to him. It was held on appeal that such proof should have been received, the court saying: "The burden of proof rests with the bailee to prove, where the bailed property is not returned to the bailor, that the property was lost by theft, etc., without negligence of the bailee. U Drive & Tour, Ltd., v. System Auto Parks, Ltd., 28 Cal.App. Supp.2d 782, 784, 71 P.2d 354, 356." In the case last cited, the Appellate Department of the Superior Court of Los Angeles County, said, with reference to the loss of an automobile from defendant's parking lot: "But it now seems settled that where the plaintiff's action is strictly one of conversion, or upon the contract for failure to redeliver the property, the defendant must justify his failure, and if he relies upon the proposition that the property was lost by theft or fire without negligence on his part, the burden is on him to prove these facts, including his lack of negligence, in order to rebut the prima facie case of plaintiff."

[2] It is true that the court in Travelers Fire Ins. Co. v. Brock & Co., supra, relied solely upon the U Drive case decided by the Appellate Department of the Superior Court, and that tribunal stated the rule without regard to whether the decisions it relied upon were based upon or decided prior or subsequent to the enactment of the act. We are of the view, however, that these cases state the proper rule, that when a bailee who is under the duty of exercising ordinary care is unable to redeliver the subject of the bailment, it is not enough for him to show that the property was lost, stolen or destroyed, but that if he relies upon such fact to excuse his failure, he must go further and show that the loss occurred without negligence on his part. As heretofore stated, a contrary rule would place upon the plaintiff, in many cases, an impossible burden. It is just and fair that one who undertakes for reward to care for a chattel should have the burden of explaining its loss or destruction while in his custody and of negativing an inference of neg-

ligence on his part arising from such loss or destruction.

[3] The contention of respondent that plaintiffs failed to prove a bailment is without merit. The testimony was uncontradicted that the plaintiffs paid a monthly fee for the privilege of storing their planes, in the hangar in the case of Dr. Shackford and on the field outside the hangar in the case of Mr. Downey. Mr. Downey's plane was in the hangar at the time of the fire for the purpose of recovering the control surfaces, a task undertaken by defendant, and Dr. Shackford's plane had been worked on and the tail wheel was to be rechecked by defendant after the test flight which took place on the day preceding the night of the fire.

[4] Respondent relies also upon the fact that no formal demand was made for the return of the planes. Mr. Downey took possession of the wreckage of his plane. Dr. Shackford saw his plane after it had been totally destroyed by the fire. A demand in such circumstances would have been futile formality. It is well settled that a demand is unnecessary where the acts of the defendant show a conversion or where, under the facts, a demand would be futile. Weinberg v. Dayton Storage Co., 50 Cal.App.2d 750, 757, 124 P.2d 155, and cases therein cited. The authorities cited involve situations where by an act of conversion the defendant has put it out of his power to redeliver the property in controversy or has evinced his determination to refuse redelivery. The same rule should apply where the property cannot be redelivered because of its loss or destruction.

It follows from the conclusions reached that it was error to grant the motion of defendant for a directed verdict. Appellants urge that the judgment should be reversed with directions to enter judgment for the plaintiffs. We are of the view that the interests of justice require that the cause be remanded for a new trial. We are further of the view that the defendant may offer evidence to show lack of negligence under his denials of the allegations of the complaints. In other words, a showing of lack of negligence would negative the charge of a breach of the contract of bailment. However, the reversal is without prejudice to amendment of the pleadings by any party should he be so advised.

The judgments are reversed.

DORAN and DRAPEAU, JJ., concur.

96 Cal.App.2d 141

Ex parte DEARO.

Cr. 4429.

District Court of Appeal, Second District, Division 3, California.

Feb. 17, 1950.

Proceeding in the matter of the application of Albert Dearo for a writ of habeas corpus to secure release from custody.

The District Court of Appeal, Shinn, P. J., held that where petitioner was convicted of a misdemeanor and sentence was suspended and he was placed on probation, and during such period the probation was revoked, based solely on report of the probation officer showing that petitioner was convicted of an offense and sentenced to the county jail, the court was authorized to revoke probation on the probation officer's report, and the absence of an opportunity to appear and be heard did not violate any constitutional right of the petitioner.

Writ discharged and petitioner remanded.

Vallée, J., dissented.

1. Criminal law 🔑1001

Where petitioner had already been sentenced he was not entitled to notice and a hearing on issue of revocation of his probation.

2. Criminal law 🔑1001

Probation is not a matter of right, but is an act of clemency, the granting and revocation of which are within the sound discretion of the trial court.

3. Criminal law 🔑641(1)

Probation proceedings are not a phase of the criminal prosecution in which accused has a right to appear and defend in person and with counsel. Const. art. 1, § 13.

4. Criminal law ⚿1001

Although a hearing as to revocation of probation should be granted in the interest of fairness and sound judicial administration, if the ex parte showing is less than conclusive, it is a discretionary matter and does not go to jurisdiction.

5. Criminal law ⚿1001

Where a judgment has been duly pronounced and then suspended upon granting of probation, the probation may be revoked without notice and the defendant ordered committed pursuant to the judgment.

6. Criminal law ⚿1001

Court in revoking probation may act informally but it may not act arbitrarily, and to be valid the order of revocation must be based upon a factual showing sufficient to justify an exercise of discretion.

7. Criminal law ⚿1001

The matter of probation is a matter of grace, and there is no constitutional right to notice and hearing on revocation of probation or suspended sentence. Const. art. 1, § 13.

8. Pardon ⚿14.18

A parole or conditional pardon may be validly revoked without notice or hearing.

9. Habeas corpus ⚿30(3)

Rights of an individual in revocation of probation are adequately protected by the availability of habeas corpus to redress wholly arbitrary conduct on the part of the revoking official.

10. Criminal law ⚿1001

Where petitioner was convicted of a misdemeanor and sentence was suspended and he was placed on probation, and during such period probation was revoked, based solely on report of probation officer showing that petitioner was convicted of an offense and sentenced to the county jail, court was authorized to revoke probation on probation officer's report, and absence of an opportunity to appear and be heard did not violate any constitutional right of petitioner. Pen.Code, 1203.2; Const. art. 1, § 13.

Bertram H. Ross, Los Angeles, for petitioner.

W. E. Simpson, District Attorney of Los Angeles County, Jere J. Sullivan, Deputy District Attorney, Los Angeles, for respondent County of Los Angeles.

SHINN, Presiding Justice.

On March 13, 1949 Albert Dearo was convicted in the city court of the city of San Fernando of violating a city ordinance declaring it a misdemeanor to be drunk in a public place. He was sentenced to the county jail for 180 days. Sentence was suspended and he was placed upon probation for a period of two years upon specified conditions. On October 25, 1949 the city court revoked his probation and he was committed to the county jail to serve the sentence previously pronounced. By this petition in habeas corpus, Dearo seeks to obtain his release upon the ground that the order revoking probation was void and in violation of the Constitution of the United States and the Constitution of the State of California because petitioner was not present in court or represented by counsel and was given no opportunity to be heard in respect to revocation. It is also alleged that petitioner did not in any way violate any of the terms and conditions of probation.

The order revoking probation was based solely upon the report of a probation officer which stated that petitioner had been charged with assault with intent to commit murder and assault with intent to commit robbery, consisting of the attempted robbery of one Talamontes by a gang of eight Mexican boys, in which Talamontes was beaten and shot in the leg; on September 12, 1949, petitioner was found guilty of simple assault, the robbery charge was dismissed, and petitioner was sentenced to serve two months in the county jail. At the time of the probation officer's report petitioner was still serving this sentence. The report stated further that in violation of the express conditions of his probation petitioner had continued to use intoxicating liquor, failed to obtain employment, and continued to associate with "his same old undesirable companions."

Section 1203.2 of the Penal Code provides that "at any time during the probationary period * * * the court may in its discretion * * * revoke and terminate such probation, if the interests of justice so require, and if the court in its judgment, shall have reason to believe from the report of the probation officer, or otherwise, that the person so placed upon probation is violating any of the conditions of his probation, or engaging in criminal practices, or has become abandoned to improper associates or a vicious life."

[1–6] The court was authorized to revoke probation solely upon the basis of the probation officer's report. Petitioner had already been sentenced and was not entitled to notice and a hearing. The absence of opportunity to appear and be heard did not violate any constitutional right of petitioner. Probation is not a matter of right; it is an act of clemency, the granting and revocation of which are within the sound discretion of the trial court. People v. Silverman, 33 Cal.App.2d 1, 5, 92 P.2d 507. Nor are probation proceedings a phase of the criminal prosecution in which the accused has a right "to appear and defend, in person and with counsel." Const., Art. 1, sec. 13; People v. Fields, 88 Cal.App.2d 30, 33, 198 P.2d 104. Although a hearing as to revocation should be granted in the interest of fairness and sound judicial administration, if the ex parte showing is less than conclusive, it is a discretionary matter under our probation law and does not go to jurisdiction. It is well settled that where judgment has been duly pronounced and then suspended upon granting of probation, the probation may be revoked without notice and the defendant ordered committed pursuant to the judgment. People v. Blankenship, 16 Cal.App.2d 606, 61 P.2d 352; People v. Scott, 74 Cal.App.2d 782, 784, 169 P.2d 970; see also In re Young, 121 Cal.App. 711, 10 P.2d 154 and cases there reviewed; People v. Hunter, 42 Cal.App.2d 87, 91-92, 108 P.2d 472; People v. Tibbits, 60 Cal.App.2d 335, 337, 140 P.2d 726; cf. People v. Williams, 24 Cal.2d 848, 151 P.2d 244. The court may act informally but it may not act arbitrarily; to be valid the order of revocation must be based upon a factual showing sufficient to justify an exercise of discretion In re Cook, 67 Cal.App.2d 20, 26, 153 P.2d 578. The granting of probation has always been regarded in California as a matter of grace and forbearance and the revocation of probation as an informal matter in which procedural steps of a trial need not be observed; and the legislature has not changed the law in these respects. To hold, at this late date, that a probationer has a constitutional right to notice and a hearing (trial) would be a repudiation of everything that has been said on the point in previous cases.

[7–9] The great preponderance of authority in other jurisdictions is clearly in accord with the rule established in our state that probation is a matter of grace. It necessarily follows that there is no constitutional right to notice and hearing on revocation of probation or suspended sentence. Varela v. Merrill, 51 Ariz. 64, 74 P.2d 569; Pagano v. Bechly, 211 Iowa 1294, 232 N.W. 798; People v. Dudley, 173 Mich. 389, 138 N.W. 1044; State ex rel. Jenks v. Municipal Court, 197 Minn. 141, 266 N.W. 433; Ex parte Boyd, 73 Okl. Cr. 441, 122 P.2d 162; Brozosky v. State, 197 Wis. 446, 222 N.W. 311. Accord: Mincy v. Crow, 198 Ga. 245, 31 S.E.2d 406; Carpenter v. Berry, 95 N.H. 151, 59 A.2d 485; People ex rel. Pasco v. Trombly, 173 App.Div. 497, 160 N.Y.S. 67; In re Weber, 75 Ohio App. 206, 61 N.E.2d 502; Ex parte Haber, 132 N.J.L. 49, 38 A.2d 448; State v. Miller, 122 S.C. 468, 115 S.E. 742. For substantially the same reasons, the prevailing rule is that parole or conditional pardon may also be validly revoked without notice or hearing. In re Smith, 33 Cal.2d 797, 804, 205 P.2d 662; Fuller v. State, 122 Ala. 32, 26 So. 146, 45 L.R.A. 502, 82 Am.St.Rep. 17; Pippin v. Johnson, 192 Ga. 450, 15 S.E.2d 712; State ex rel. Davis v. Hunter, 124 Iowa 569, 100 N.W. 510, 104 Am.St.Rep. 361; In re Patterson, 94 Kan. 439, 146 P. 1009, L.R.A.1915F, 541; Wright v. Herzog, 182 Md. 316, 34 A.2d 460; Guy v. Utecht, 216 Minn. 255, 12 N.W.2d 753; People ex rel. Hannon v. Warden, 209 App.Div. 521, 205 N.Y.S. 235; Ex parte Paquette, 112 Vt. 441, 27 A.2d

129; 39 Am.Jur., sec. 77, p. 568. But cf. People ex rel. Joyce v. Strassheim, 242 Ill. 359, 90 N.E. 118; Fleenor v. Hammond, 6 Cir., 116 F.2d 982, 132 A.L.R. 1241. It is generally recognized by the authorities that while revocation is largely a discretionary matter, the rights of the individual are adequately protected by the availability of habeas corpus to redress wholly arbitrary conduct on the part of the revoking official. See In re Cook, supra.

Our research has disclosed only four jurisdictions in which the right to notice and hearing on revocation of probation has been said to be a constitutional one. Ex parte Lucero, 23 N.M. 433, 168 P. 713, L.R.A.1918C, 549; State v. O'Neal, 147 Wash. 169, 265 P. 175, following the Lucero case; State v. Zolantakis, 70 Utah 296, 259 P. 1044, 54 A.L.R. 1463, denial of hearing held error; and Brill v. State, 159 Fla. 682, 32 So.2d 607, *dictum* only, Cf. State v. Bonza, 106 Utah 553, 150 P.2d 970, *dictum* that due process is met by hearing. In these jurisdictions, probation appears to be regarded not as an act of clemency, but as a substantial judicially established right of the defendant of which he may not be divested without a trial. The rationale of the decisions is not in accord with the views expressed in the California cases and other leading decisions, which we have cited, and we see no occasion to follow them. Many of the cases cited in the annotations, 54 A.L.R. 1471; 60 A.L.R. 1420; 132 A.L.R. 1248, in support of the proposition that notice and hearing are prerequisites to revocation merely hold, without reference to or discussion of constitutional guarantees, that *statutes* providing for notice and hearing must be followed (see Plunkett v. Miller, 161 Ga. 466, 131 S.E. 170; People v. Enright, 332 Ill. App. 655, 75 N.E.2d 777; Blusinsky v. Commonwealth, 284 Ky. 395, 144 S.W.2d 1038; People v. Myers, 306 Mich. 100, 10 N.W.2d 323; People v. Hill, 164 Misc. 370, 300 N.Y.S. 532; State v. Burnette, 173 N.C. 734, 91 S.E. 364; State ex rel. Vadnais v. Stair, 48 N.D. 472, 185 N.W. 301; Howe v. State, 170 Tenn. 571, 98 S.W.2d 93; In re Hall, 100 Vt. 197, 136 A. 24, or that failure to give notice and hearing according to ordinary standards of acceptable procedure may constitute reversible error. See People v. Hodges, 231 Mich. 656, 204 N.W. 801; Sellers v. State, 105 Neb. 748, 181 N.W. 862; Slayton v. Commonwealth, 185 Va. 357, 38 S.E.2d 479. See also, In re Hall, 78 Okl.Cr. 83, 143 P.2d 833. Such cases, of course, are of no avail to petitioner here, in view of the fact, which must be conceded, that the procedure followed was strictly in accordance with the governing statute. In Escoe v. Zerbst, 295 U.S. 490, 492-493, 55 S.Ct. 818, 819, 79 L.Ed. 1566, 1568-1569, in which an order revoking probation upon the basis of a probation officer's report, without a hearing as required by federal statute, was held to be invalid, Mr. Justice Cardozo, speaking for a unanimous court, stated, "In thus holding we do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose. Burns v. United States, 287 U.S. 216, 53 S.Ct. 154, 77 L.Ed. 266."

[10] The showing in the present case was more than sufficient to warrant revocation of probation, and was in a form permitted by law.

The writ is discharged and the petitioner is remanded.

WOOD, J., concurs.

VALLÉE, Justice.

I dissent. A court should hear before it condemns. In my opinion, revocation of the suspension of execution of sentence without reasonable notice to the defendant and an opportunity to be heard on the issue of whether he violated the terms of the suspension—unless after the exercise of reasonable diligence notice cannot be given and an opportunity to be heard cannot be afforded (see People v. Williams, 24 Cal.2d 848, 853, 151 P.2d 244)—constitutes a deprivation of the defendant's rights guaranteed by the Fourteenth

Amendment to the Constitution of the United States and by Article 1, section 13, of the Constitution of California. In nearly every jurisdiction in which the question has arisen, it has been held that a convicted defendant, released under a suspended sentence, or under a suspension of execution of sentence, is entitled to notice and a hearing on the issue whether he has violated the conditions of the suspension before it may be revoked. See cases collected in 54 A.L.R. 1471; 60 A.L.R. 1420; 132 A.L.R. 1248; 15 Am.Jur. 151, sec. 500. It would be a fruitless task to analyze here each of the many cases from other jurisdictions cited by the majority. Careful study and analysis of them will readily disclose that few, if any, support the propositions for which they are cited. Scrutiny of the cases directly in point on the subject reveals that the statement found in American Jurisprudence is correct. That statement reads: "In a number of cases the view has been taken that a convicted defendant, released under a suspended sentence, is entitled to notice and a hearing on the issue whether he has broken the conditions of the suspension of sentence, before the suspension may be revoked. This hearing must be according to some well-recognized and established rules of judicial procedure; an affidavit or other pleading setting forth the facts relied on for revocation must be filed, with opportunity to plead to the charge, and the right to cross-examine witnesses must be given before revocation can be decreed. * * * *In a few jurisdictions* the revocation of a suspension rests within the discretion of the court, and a prisoner may be compelled at will to serve out his sentence." 15 Am.Jur. 151, sec. 500. (Italics added.)

The opinion and decision here are in direct conflict with In re Cook, 67 Cal. App.2d 20, 153 P.2d 578. In that case it was squarely held that suspension of execution of sentence cannot be revoked without notice to the defendant and an opportunity to be heard. The Cook case is the only California case in which the constitutional question was directly presented and decided. It is well reasoned, correctly decided, and should be followed.

The reasoning of the majority is specious but beside the point. It accepts as true, as did the city court, the report of the probation officer, of which the defendant was not given notice, and which he was not given an opportunity to refute. Constitutional rights should neither be scuttled nor whittled away because the case may be a hard one.

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95 Cal.App.2d 896

KNOX v. ATCHISON, T. & S. F. RY. CO.

Civ. 17170.

District Court of Appeal, Second District,
Division 2, California.
Feb. 6, 1950.

Thomas W. Knox brought action under Federal Employers' Liability Act, § 1 et seq., as amended, 45 U.S.C.A. § 51 et seq., and the Federal Boiler Inspection Act, § 2 et seq., as amended, 45 U.S.C.A. § 23 et seq., against the Atchison, Topeka & Santa Fe Railway Company to recover for injuries allegedly sustained by plaintiff during course of his employment for defendant.

An order granting a nonsuit and an order after the nonsuit was granted denying plaintiff's motion for leave to amend complaint to conform to proof was entered by the Superior Court, Los Angeles County, Benjamin J. Scheinman, J., and the plaintiff appealed.

The District Court of Appeal, Moore, P. J., held that complaint failed to state cause of action for violation of Federal Boiler Inspection Act and that trial court did not abuse its discretion in denying plaintiff's motion for leave to amend complaint by adding allegation of general negligence.

Affirmed.

1. Master and servant 🔑110

A railroad company may continue its operation of locomotives for reasonable time without installing new safety devices without violating Federal Boiler Inspection Act. Boiler Inspection Act, § 2 et seq., as amended, 45 U.S.C.A. § 23 et seq.

2. Master and servant ⚷87, 110, 124(2)

An employee may recover damages for negligence of carrier in interstate commerce under Federal Employers' Liability Act, but under Federal Boiler Inspection Act Recovery may be had by employee only when injury is caused by prohibited defect or a failure properly to inspect locomotive as required by the Act. Federal Employers' Liability Act, §§ 1 et seq., as amended, 45 U.S.C.A. §§ 51 et seq.; Boiler Inspection Act, §§ 2 et seq., as amended, 2, 4, 5, as amended, 45 U.S.C.A. §§ 23 et seq., 23, 26–28.

3. Master and servant ⚷110

Federal Boiler Inspection Act imposes no liability upon carrier operating in interstate commerce for injuries sustained by its employees so long as carrier complies with specified requirements of the Act. Boiler Inspection Act, §§ 2 et seq., 2, 4, 5, as amended, 45 U.S.C.A. §§ 23 et seq., 23, 26–28.

4. Master and servant ⚷258(13)

Complaint which alleged that plaintiff was employed as locomotive fireman by defendant railroad on steam locomotives which were defective in that various blow-off cocks on such locomotives were maintained without mufflers, and that as proximate cause thereof, plaintiff suffered from noises generated by unmuffled escaping steam which caused his hearing to become gradually impaired, failed to state a cause of action under Boiler Inspection Act, which imposed no duty upon railroads to equip their locomotives with mufflers. Code Civ.Proc. § 581c; Boiler Inspection Act, §§ 2 et seq., 2, 4, 5, as amended, 45 U.S.C.A. §§ 23 et seq., 23, 26–28.

5. Pleading ⚷236(3)

Where only basis for recovery alleged in fireman's personal injury action against railroad was violation of Boiler Inspection Act, and there was no allegation of negligence, or evidence in record as to negligence, denial of motion to amend complaint by pleading negligence after ruling that there was no violation of Boiler Inspection Act was not abuse of discretion. Federal Employers' Act, § 1 et seq., as amended, 45 U.S.C.A. § 51 et seq.; Boiler Inspection Act, § 2 et seq., as amended, 45 U.S.C.A. § 23 et seq.

6. Master and servant ⚷258(13)

Negligence is not a basis for liability of interstate carrier to its employee under Boiler Inspection Act, and an allegation thereof would be superfluous. Boiler Inspection Act, § 2 et seq., as amended, 45 U.S.C.A. § 23 et seq.

7. Pleading ⚷237(8)

Amendments of pleadings to conform with proofs should not be allowed when they raise new issues for first time.

8. Pleading ⚷236(3)

Granting leave to amend a pleading during course of a trial is within trial court's discretion.

9. Appeal and error ⚷681

Denial of motion to amend a pleading during course of trial formed no basis for an appeal unless accompanied by proposed amendment.

10. Pleading ⚷229

Amendments to pleadings are liberally allowed only so long as issues will not be radically changed by proposed amendment.

Hildebrand, Bills & McLeod, Los Angeles, John M. Ennis, Los Angeles, for appellant.

Jennings & Belcher, Los Angeles, Leo E. Sievert, San Francisco, and Robert W. Walker, Los Angeles, Louis E. Kearney, Los Angeles, of counsel, for respondent.

MOORE, Presiding Justice.

Plaintiff appeals from the order granting a nonsuit, Code of Civil Proc., sec. 581c; Nicholson v. Henderson, 25 Cal.2d 375, 378, 153 P.2d 945, and from the order made after the nonsuit was granted denying his motion "for leave to amend the complaint to conform to proof by adding an allegation of general negligence."

Pleadings and Proof

The complaint alleges that this action was brought "under and by virtue of the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. and the Federal Boiler Inspection Act, 45 U.S.C.A. § 23[1] et seq."; that between August, 1926, and July, 1946, plaintiff was steadily employed by respondent as a locomotive fireman and operated various steam locomotives and particularly those of the 2900 type; that such locomotives were defective in violation of the provisions of section 23, supra, in that various blow-off cocks on such locomotives were maintained without mufflers; that he was required to and did blow off the steam from such engines through the blow-off devices and that as a proximate result of their inefficient condition he suffered the noises generated by the unmuffled escaping steam which caused his hearing to become gradually impaired on and after June 30, 1946. He alleged as a direct and proximate result of the unsafe condition of the locomotives his hearing in both ears was impaired and he suffered severe shock and extreme pain.

The proof made of such allegations is as follows: Appellant's employment covered about ten years and three months, to wit, from August 27, 1926, to 1931; 28 days in 1937 and from May, 1941, to June 30, 1946. On the latter date he was disqualified by reason of his impaired hearing. During the interims between his seasons of employment by respondent he worked a total of about three years on two other railroads. During the period from August, 1942, to May, 1945, he served respondent 21 months as a locomotive engineer. Therefore, of his last five years and two months he served only three years and five months as fireman. During appellant's total remaining eight years and five months of employment by respondent, some of the engines he fired had mufflers on the blow-off devices. During his railroad service appellant took periodic medical examinations. At none of them did he complain of pain caused to his ears by the blow-off operations.

After being washed a boiler may be used for 30 days. It is essential to open the blow-off cock periodically after 20 days service as the solids in the water become concentrated and cause "foaming" with consequent loss of power. Thus the blow-off cock is an indispensable appurtenance to the locomotive powered by steam. While in respondent's service appellant operated the manual blow-off cock as many as five times in ten miles by opening the cock five seconds and closing it three. When opened it makes a loud rasping noise. To overcome the violence of the discharge the muffler was invented. It is a steel cylinder weighing about two hundred pounds into which the steam is blown to deaden the sound and emit the steam beneath the locomotive. It was not invented prior to 1930, nor used on overland road engines prior to 1938. A number where thereafter installed prior to commencement of the war. Many locomotives of respondent had the blow-off cocks prior to June 30, 1946. All overland passenger engines have had mufflers since a time before January, 1942. They were installed by respondent after receiving the engines from the factory. It was estimated that by 1949 seventy per cent of all locomotives were equipped with mufflers.

The witness Parisen called by appellant testified that while he worked for the Union Pacific from 1943 to 1945 practically all engines in the freight service were not equipped with mufflers. The company installed them from 1938 to 1941 on some engines, but stopped because of the shortage of steel and labor.

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[1] Section 23, U.S.C.A. Title 45. "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

The only basis for recovery alleged was respondent's violation of the Boiler Inspection Act.

At the trial there was no allegation of negligence. Neither was there an atttempt to prove anything but the noise of the blow-off cocks, appellant's having suffered hearing impairment and respondent's failure to equip its locomotives with mufflers. In this state of the pleading and evidence the order of nonsuit was properly entered.

The respect in which respondent is alleged to have violated the Boiler Inspection Act was by improperly maintaining "various blow-off cocks" on its engines without mufflers, to appellant's detriment. That is answered by the decision in Baltimore & Ohio Railroad Company v. Groeger, 266 U.S. 521, 45 S.Ct. 169, 69 L.Ed. 419, where it was contended that the death of the engineer was caused by reason of the fact that the locomotive was not equipped with a "fusible plug" in the crown sheet. Judgment for plaintiffs was reversed because there was neither statute nor order by the commission requiring the installation of fusible plugs. The court said, 266 U.S. 521, 45 S.Ct. 169, at page 172, 69 L.Ed. at page 424, "that defendant was not liable for failure to furnish the best mechanical contrivances and inventions or to discard appliances upon discovery of later improvements, provided the boiler was in proper condition and safe to operate, as required by the statute." The quoted language should dispose of the question whether respondent owed any other duty to appellant than that required by statute.

[1-4] No authority is cited to the effect that common carriers must at once install every device of ostensibly valuable advantage, or stop operation of locomotives until the commission acts. On the contrary, it is established by the cited authorities that without violating the Boiler Inspection Act a railroad company may continue its operations for a reasonable time without installing new safety devices. While under the Federal Employers' Liability Act, section 51, Title 45, any employee may recover damages for negligence of the carrier in interstate commerce, yet under the Boiler Inspection Act recovery may be had by an employee only when the injury is caused by a prohibited defect or a failure properly to inspect the locomotive as required by sections 26, 27 and 28. By enacting section 23 Congress placed all responsibility upon the employer by the requirements of such section in which the word negligence does not occur. Hence, no liability under the Boiler Inspection Act is imposed so long as the carrier complies with the specified requirements.

From the foregoing considerations it follows that the order of nonsuit was correct and on that ground the judgment must be affirmed. In view of such holding, a discussion of the proof with reference to the effect of the discharge of the blow-off cocks on appellant's hearing will not be necessary.

Denial of Motion to Amend Complaint Not Error

[5] To grant the application for leave to amend by pleading negligence under the circumstances would have been an undue interruption of the administration of justice. There was no evidence in the record with which the proposed allegation might conform. The mufflers could not be obtained by simply placing an order—due to the shortage of labor and materials. There is no evidence that respondent knew that the noise from the unmuffled blow-off cocks might affect the hearing of a fireman, nor proof that the muffled sounds of the blow-off cock do not cause higher frequencies than when not muffled. Appellant argues that the trial disclosed that the ear of the fireman at the time of the blowoff is only six feet from the blow-off cock. There is no evidence that respondent could have moved it to a location more remote or that effort had been futilely made to close out the sound by closing the cab window.

The authorities cited by appellant in support of his claim that he proved negligence in maintenance, control and operation of the locomotives are distinguished on their facts. Fuller v. Oregon–Washington Railroad & Nav. Company, 93 Or. 160, 181 P. 334, 338; Atchison, Topeka & Santa Fe R. Co. v. Superior Court, 12 Cal.2d 549, 86 P.

2d 85; Edington v. Southern Pacific Company, 12 Cal.App.2d 200, 55 P.2d 553; Apache Railway Company v. Shumway, 62 Ariz. 359, 158 P.2d 142, 159 A.L.R. 857; Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282. For illustration, in Fuller v. Oregon-Washington Railroad & Nav. Company the commission had made a rule that locomotives constructed after a certain fashion subsequent to a specified date should have a designed type of "rear headlight" on all locomotives as they entered the shop for heavy repairs. It was a question for the jury whether making a trip without such light as required was negligence. In Atchison, Topeka & Santa Fe R. Co. v. Superior Court it is held that the complaint was broad enough to allege a right of recovery for common-law negligence, independent of the Federal Employers' Liability Act.

[6-10] If negligence is not a basis for liability under the act, an allegation thereof would be superfluous. Lilly v. Grand Trunk Western Railway Company, 317 U. S. 481, 63 S.Ct. 347, 87 L.Ed. 411, 415. Amendments to conform with the proofs should not be allowed when they raise new issues for the first time. Lavely v. Nonemaker, 212 Cal. 380, 385, 298 P. 976; Bank v. Foreman, 102 Cal.App. 756, 283 P. 874; Weinberg v. Dayton Storage Co., 50 Cal. App.2d 750, 759, 124 P.2d 155; Richter v. Adams, 19 Cal.App.2d 572, 578, 66 P.2d 226. Granting leave to amend a pleading during the course of a trial is within the sound discretion of the court. Brown v. Aguilar, 202 Cal. 143, 149, 259 P. 735; Jew Fun Him v. Occidental Life Insurance Company, 88 Cal.App.2d 246, 250, 198 P. 2d 711; Neher v. Kauffman, 197 Cal. 674, 686, 242 P. 713; Todhunter v. Klemmer, 134 Cal. 60, 62, 66 P. 75. Finally, such a motion makes no appeal unless accompanied by the proposed amendment. Martin v. Thompson, 62 Cal. 618, 45 Am.Rep. 663; De L'Eau v. Williams, 139 Cal.App. 116, 117, 33 P.2d 427; Davis v. Perry, 120 Cal. App. 670, 674, 8 P.2d 514. It is the rule that amendments to pleadings are liberal only so long as the issues will not be radically changed by the proposed amendment. Abbott v. Limited Mutual Compensation Insurance Company, 30 Cal.App.2d 157, 161, 85 P.2d 961.

The order denying leave to amend the complaint and the judgment of nonsuit are affirmed.

McCOMB and WILSON, JJ., concur.

86 Cal.App.2d 217

PEOPLE v. POLICE COURT OF CITY OF FRESNO, DEPARTMENT I.

Civ. 4009.

District Court of Appeal, Fourth District, California.

Feb. 24, 1950.

The People of the State of California brought a proceeding for a writ of mandate commanding the Police Court of the City of Fresno, Department 1, to enter on its minutes and records a jury's verdict finding J. H. McMillan guilty of violating the Unfair Practices Act.

From a judgment of the Superior Court of Fresno County, Clark Clement, J., ordering the issuance of a peremptory writ of mandate, respondent appealed.

The District Court of Appeal, Barnard, P. J., held that the trial court erred in ordering issuance of the writ, though respondent police court erred in instructing the jury to reconsider the evidence on the questions of accused's specific intent and injury to a competitor and discharging the jury after it reported its inability to agree on a second verdict, instead of causing entry of the verdict of guilty and later granting a new trial.

Judgment reversed.

1. Criminal law 🔑889

A police judge, erroneously submitting to jury questions of accused's specific intent to violate Unfair Practices Act and injury to a competitor after strongly intimating in instructions to jury that evidence was insufficient to justify conviction of such offense, should not have attempted to correct such error by instructing jury, after it returned verdict of guilty, to reconsider evidence respecting such matters, on ground that jury had mistaken law because evidence was insufficient to establish such essential elements of offense charged, but should have caused entry of such verdict and later granted new trial. Business and Professions Code, §§ 17043, 17044; Pen.Code, § 1161.

2. Mandamus ⟾61

A police judge's error in instructing jury, after it returned verdict of guilty of violating Unfair Practices Act, to reconsider questions of accused's specific intent and injury to competitor, because of judge's opinion that evidence was insufficient to establish such essential elements of crime, instead of causing entry of verdict and granting new trial, constituted judicial error, rather than abuse of discretion, so as to preclude issuance of writ of mandate to compel entry of such verdict after jury's discharge because of inability to agree on second verdict. Business and Professions Code, §§ 17043, 17044; Pen.Code, § 1161.

3. Mandamus ⟾61

Where district attorney never requested entry of jury's verdict of guilty of violating Unfair Practices Act or polling of jury, though police judge stated that evidence was insufficient in his opinion to prove accused's specific intent to violate act or injury to competitor, as required to warrant conviction, before instructing jury to reconsider evidence respecting such matters on defendant's request, the state was not entitled to writ of mandate to compel entry of such verdict after jury's discharge because of inability to agree on second verdict. Business and Professions Code, §§ 17043, 17044; Pen.Code, § 1161.

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C. M. Ozias, Breckenridge Thomas, Fresno, for appellant.

James M. Thuesen, District Attorney, Dan B. Eymann and Richard L. Shepard, Deputy District Attorneys, Fresno, for petitioner and respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment ordering the issuance of a peremptory writ of mandate.

In an action in the respondent court, which has the same jurisdiction as a Class A Justice's court, one J. H. McMillan was charged in separate counts with violating sections 17043 and 17044 of the Business and Professions Code, Unfair Practices Act. The trial lasted four days and the jury brought in a verdict finding the defendant guilty. The judge read the verdict, but before anything else was done defendant's counsel called the court's attention to section 1161 of the Penal Code. The judge suggested a polling of the jury, defendant's counsel expressed doubt as to whether this should be done, the district attorney said nothing, and the jury was not polled. The judge then stated that the evidence was not sufficient to prove the specific intent required by law, or any injury to a competitor, two of the three basic requirements. Giving this as a reason, he expressed the opinion that the jury had mistaken the law. He then stated that in order to return a fair verdict in the case "you should collectively reconsider the evidence with respect to those two factors," and instructed them "to again deliberate the matter." He then asked whether the jury desired to go to dinner before continuing its deliberations. The district attorney then started to speak saying "I am a little confused—". The court then stated that he wanted no further argument at that time, and asked the jury to give an expression as to whether they wanted to go to dinner. A recess was then taken for dinner. When court reconvened the judge stated that the bailiff had informed him that the jury desired further instructions with respect to the law, and asked whether it desired to have all the instructions repeated or to have instructions with respect to any special problem. The foreman asked a question which the court answered, after which several other jurors asked questions and a number of further instructions were given by the court. The jury then retired and later reported that it was unable to agree upon a verdict. The court asked if it was desired to have the jury polled, each side replied in the negative, and the court discharged the jury.

A petition was later filed in the superior court, by the People, praying for a writ of mandate commanding the respondent court to enter on its minutes and records the verdict of guilty which was originally brought in by the jury. The only evidence produced at the hearing was the reporter's transcript of the proceedings, in the other action, after the arguments of counsel had closed. The court found that the allegations of the petition were true and entered a judgment ordering a peremptory writ to issue requiring the respondent court to enter the verdict of guilty on its minutes. From this judgment, the respondent police court has appealed.

In support of the judgment the petitioner contends that section 1161 of the Penal Code has no application to justice or police court proceedings; that this section was not properly applied under the circumstances of this case; and that mandamus is a proper remedy since petitioner had a clear right to have the verdict entered and the respondent court abused its discretion in failing to have it entered.

[1] The reasons assigned for the contention that section 1161 is never applicable in justice or police court proceedings are not too convincing. However, it is not necessary to decide that point here. We are inclined to agree with the contention that section 1161 was not properly applied in the action here in question. In his original instructions, which were lengthy and confusing, the judge had strongly and repeatedly intimated that the evidence was not sufficient in several respects to justify a verdict of guilty. However, he did not advise the jury to acquit, but left these matters to the jury as questions of fact. When the jury returned with the verdict of guilty the judge explained, as his reason for believing that it had mistaken the law, that he considered the evidence insufficient to establish two of the three essential elements of the crime. In thus explaining the reason for his action the judge disclosed that it appeared to him that the jury had mistaken the facts rather than mistaken the law. Having previously erred in submitting such questions to the jury under those circumstances, he should not have attempted to correct his own error by resorting to section 1161. In the situation as it then existed, he should have caused the verdict to be entered and later granted a new trial.

[2] It does not necessarily follow, however, that he may or should be compelled to now enter that verdict, thus enabling a new trial to be granted, and placing the cause in the same position it was in before this application for a writ was made.

Assuming that the court erred in thus applying section 1161, this constituted judicial error rather than an abuse of discretion. While it is contended that the court acted wrongly, it clearly appears that it did act, and the case was allowed to proceed without any serious attempt to object to the procedure adopted. While there may have been error no lack of jurisdiction appears. And the People were not left without a remedy by the result, as the case was not closed but was left open for a new trial.

[3] Moreover, proper steps were not taken at the time to make sure that the verdict was a proper one and one which should have been entered. No request was ever made by the district attorney that the verdict be entered, or that steps be taken to determine whether it should be entered. While the court called attention to the matter, before acting on the request of the defendant to apply section 1161, the district attorney at no time asked to have the jury polled or to have it ascertained that each member of the jury had agreed to the verdict. All that the record shows is that when the jury returned into court the foreman stated that it had arrived at a verdict, whereupon the judge read a verdict purporting to find the defendant guilty on the respective counts. The jury was not asked whether or not this was its verdict, it was not polled, and no attempt was made to ascertain whether or not all of the jurors had agreed to the purported verdict as read. This is a matter that could not now be corrected, the jury having long since been dis-

charged, and the parties could not now be placed in the same position as when the error occurred. It would be an injustice, under these circumstances, to order the earlier verdict entered without any of the usual safeguards.

It further appears that it would be an idle act to now compel the entry of this verdict, if that could legally be done. If that were done a new trial could be granted, and the record indicates beyond doubt that this should and would be done. That is the exact situation that existed when the jury disagreed and was discharged, and with which the petitioner was not satisfied.

We conclude, on the record before us, that the trial court erred in ordering a peremptory writ of mandate to be issued requiring the respondent court to enter a verdict of guilty on its minutes and records.

The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.

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96 Cal.App.2d 215

PEOPLE v. KROUT et al.

Cr. 4436.

District Court of Appeal, Second District, Division 3, California.

Feb. 24, 1950.

Charles V. Krout and Melvin E. Krout were tried for forgery, and the first-named defendant, after conviction and serving 8 months in penitentiary, filed petition for writ of error coram nobis, which was denied, after which he filed petition for new trial.

The Superior Court of Los Angeles County, Clement D. Nye, J., denied the petition, and defendant appealed.

The District Court of Appeal, Wood, J., held that if petition were regarded as mo**tion for new trial it was not timely, and if regarded as petition for writ of error coram nobis it would not be considered, since defendant's contention could have been presented in a timely motion for new trial and on appeal from judgment of conviction.**

Order affirmed.

1. Criminal law 🔑951(2)

If petition for new trial, filed 1¾ years after judgment, were regarded as motion for new trial, it was filed too late and would not be considered. Pen.Code, § 1182.

2. Criminal law 🔑951(2)

Motion for new trial must be made before judgment is pronounced. Pen.Code, § 1182.

3. Criminal law 🔑997

If a petition for new trial were regarded as motion for writ of error coram nobis, the defendant was not entitled to reconsideration of matters which had been decided in a previous proceeding brought by defendant for writ of error coram nobis.

4. Criminal law 🔑997

Where a defendant's contention could have been presented on a motion for a new trial or on an appeal from judgment of conviction and he has failed to avail himself of either remedy, a writ of error coram nobis will not be entertained to review the alleged error.

5. Criminal law 🔑997

If petition for new trial were regarded as a coram nobis proceeding, the contention of defendant that error was committed in presenting case on preliminary transcript would not be considered, since it could have been presented on motion for new trial and on appeal from judgment of conviction.

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Charles V. Krout, in pro. per.

Fred N. Howser, Attorney General, Donald D. Stoker, Deputy Attorney General, for respondent.

WOOD, Justice.

On October 2, 1947, defendant was adjudged guilty of forgery in three counts. He did not make a motion for a new trial (unless this proceeding be regarded as such a motion). He did not appeal from the judgment, sentencing him to the penitentiary, which was pronounced on October 22, 1947.

After he had been in the penitentiary about 8 months, he filed a petition for a writ of error *coram nobis*. He appealed from the order of the trial court denying that petition. The order was affirmed on February 16, 1949. People v. Krout, 90 Cal. App.2d 205, 202 P.2d 635.

On August 12, 1949, he filed a "Petition for a New Trial." This is an appeal from the order denying that petition.

Appellant asserts (1) that a conspiracy existed between his counsel (a deputy public defender) and a deputy district attorney, and that they "tricked" him into waiving his right to a jury trial; (2) that they told him that if he would agree to a court trial his counsel would ask for, and the deputy district attorney would agree to, a dismissal; (3) that he did not have a fair trial because they presented the case upon the transcript of the preliminary examination without his knowledge or consent; (4) that his counsel did not subpoena available witnesses and did not obtain available records; and (5) there was no evidence of intent to defraud.

[1, 2] If the petition now before the court be regarded as a motion for a new trial, it was filed too late and cannot be considered. It was filed about 1¾ years after judgment. A motion for a new trial must be made before judgment is pronounced. Sec. 1182, Pen.Code; People v. Fry, 137 Cal.App. 525, 529, 31 P.2d 204.

[3] If the petition be regarded as a petition for a writ of error *coram nobis*, it appears that all the alleged points abovementioned, upon which the petition is based, except the one that appellant did not have a fair trial because the case was presented upon the preliminary transcript, were included in the said former proceeding for a writ of error *coram nobis*. Appellant is not entitled to have said matters, which were decided therein, reconsidered in this proceeding.

[4, 5] Appellant's contention that he did not have a fair trial because the case was presented upon the preliminary transcript could have been considered on a proper and timely motion for a new trial and on an appeal from the judgment of conviction. As above stated, appellant did not make such a motion for a new trial and he did not appeal from such judgment. Where a defendant's contention could have been presented on a motion for a new trial or on an appeal from a judgment, and he has failed to avail himself of either remedy, a writ of error *coram nobis* will not be entertained to review the alleged error. People v. Watkins, 92 Cal.App.2d 375, 376, 206 P.2d 1118. Therefore, even if this present proceeding be regarded as a *coram nobis* proceeding, the contention of appellant that error was committed in presenting the case on the preliminary transcript cannot be considered herein.

The order denying the "Petition for a New Trial" is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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96 Cal.App.2d 84

WILSON v. PETERSON et al.

Civ. 17459.

District Court of Appeal, Second District,
Division 2, California.
Feb. 15, 1950.

Jean Wilson sued Lloyd Peterson and others for a declaration that a deed wherein she and the first-named defendant were named as joint tenants of a parcel of realty was in fact a mortgage given to secure a loan.

The Superior Court of Los Angeles County, William B. McKesson, J., dismissed the complaint, and plaintiff appealed.

The District Court of Appeal, McComb, J., held that possession by defendant of the parcel of realty in dispute for more than five years gave him prescriptive title.

Judgment affirmed.

Joint tenancy ⚷9
Mortgages ⚷608½

Where defendant had been in possession of realty continuously for over five years, claiming as a joint tenant, defendant acquired prescriptive title to realty and complaint of plaintiff seeking to have deed under which defendant was claiming to be declared a mortgage to secure a loan was properly dismsised. Code Civ.Proc. §§ 322, 437c, 1060; Civ.Code, § 1007.

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Frank C. Shoemaker, Los Angeles, for appellant.

Ira A. Gwin, Los Angeles, for respondent.

McCOMB, Justice.

Plaintiff appeals from an order granting defendants' motion to dismiss the complaint pursuant to the provisions of section 437c of the Code of Civil Procedure.*

Facts: Plaintiff filed a complaint pursuant to the provisions of section 1060 of the Code of Civil Procedure, whereby she sought to have the court declare that a deed, wherein she and defendant Peterson were named as joint tenants of a parcel of real property, was not in fact a deed of the property in joint tenancy, but was a mortgage given by her to secure a loan of $500 from defendant Peterson. After the answer had been filed defendant filed an affidavit pursuant to the provisions of section 437c, Code of Civil Procedure, and made a motion to dismiss the complaint. In the affidavit, which was not denied by plaintiff, it was alleged that said defendant had been in possession of a portion of the disputed property as a joint tenant since September 3, 1943. The present action was filed March 29, 1949. The trial court granted the motion and judgment dismissing the action was entered.

Question: Was plaintiff's cause of action barred under the provisions of section 1007, Civil Code, and section 322, Code of Civil Procedure?

This question must be answered in the affirmative. When an occupant of real property enters into possession thereof under claim of title and remains in such possession continuously for a period of 5 years, such occupant acquires prescriptive title to the property. (Sec. 1007, Civil Code; Sec. 322, Code of Civil Procedure.)

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* Section 437c, Code of Civil Procedure reads in part as follows: "In superior courts and justices' courts of Class A and municipal courts when an answer is filed in an action to recover upon a debt or upon a liquidated demand including an action to enforce or foreclose a lien or mortgage or to recover an unliquidated debt or demand for a sum of money only arising on a contract express or implied in fact or in law or to recover possession of specific real or personal property or for specific performance of a contract in writing for the sale or purchase of property, or for an accounting arising on a written contract if it is claimed that there is no defense to the action or that the action has no merit, on motion of either party, after notice of the time and place thereof in writing served on the other side at least ten days before such motion, supported by affidavit of any person or persons having knowledge of the facts, the answer may be stricken out or the complaint may be dismissed and judgment may be entered, in the discretion of the court unless the other party, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact. A judgment so entered is an appealable judgment as in other cases.

"*Contents of affidavits.* The affidavit or affidavits in support of the motion must contain facts sufficient to entitle plaintiff or defendant to a judgment in the action, and the facts stated therein shall be within the personal knowledge of the affiant, and shall set forth with particularity, and each affidavit shall show affirmatively that affiant, if sworn as a witness, can testify competently thereto.

"The affidavit or affidavits in opposition to said motion shall be made by the plaintiff or defendant, or by any other person having knowledge of the facts, and together shall set forth facts showing that the party has a good and substantial defense to the plaintiff's action (or to a portion thereof) or that a good cause of action exists upon the merits. The facts stated in each affidavit shall be within the personal knowledge of the affiant, shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto. * * *"

In view of the fact that the uncontradicted statement in defendant's affidavit demonstrated that he had been for more than 5 years in continuous possession of a portion of the property in dispute under a claim that he was an owner thereof as a joint tenant, plaintiff's cause of action, if any, was barred, and judgment was properly entered dismissing the complaint pursuant to the provisions of section 437c of the Code of Civil Procedure.

Rowland v. Clark, 91 Cal.App.2d 880, 206 P.2d 59, relied on by plaintiff, is not applicable to the facts of the present case. Such case involves a discussion of a resulting trust and does not in any way have any bearing upon the statute of limitations.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

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96 Cal.App.2d 201

JONES et al. v. SCURLOCK.

Civ. 17295.

District Court of Appeal, Second District, Division 2, California.

Feb. 23, 1950.

Rehearing Denied March 10, 1950.

Hearing Denied April 20, 1950.

Emma May Jones and another sued Violet June Scurlock for injuries sustained when bus in which plaintiffs were passengers collided with automobile driven by defendant.

An order granting plaintiffs a new trial after verdict of jury for defendant was entered by the Superior Court of Los Angeles County, Fred Miller, J., and the defendant appealed.

The District Court of Appeal, McComb, J., held that it must be presumed that trial judge performed his duty, considered the whole record in the case and decided that giving of improper instruction was prejudicial and resulted in a miscarriage of justice.

Order affirmed.

1. Automobiles 🔑246(60)

An instruction on "presumption of due care" should not have been given in action arising out of automobile collision where parties to the action were living and all circumstances of the accident were proved.

2. Appeal and error 🔑933(1)

On appeal from order granting new trial on plaintiffs' motion on ground that trial court erred in giving instruction on "presumption of due care", appellate court would indulge presumption that trial judge performed his duty, considered whole record in case and decided that giving of instruction was prejudicial and resulted in a miscarriage of justice. Const. art. 6, § 4½.

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Bauder, Gilbert, Thompson & Kelly, Henry F. Walker, Los Angeles, of counsel, for appellant.

Fred M. Riedman and Edison J. Demler, Long Beach, for respondents.

McCOMB, Justice.

This is an appeal by defendant from an order granting plaintiffs' motion for a new trial after trial before a jury in an action to recover damages for personal injuries.

Facts: Plaintiffs were passengers on a Long Beach City Lines bus when it collided with an automobile driven by defendant at the intersection of American Avenue and Pacific Coast Highway in the city of Long Beach. At the time of the collision the bus was proceeding east across American Avenue on Pacific Coast Highway while defendant was in the act of making a left turn from an easterly direction on Pacific Coast Highway south on American Avenue. Defendant turned in front of the bus, and the bus driver, trying to avoid hitting defendant's car, applied his brakes, throwing plaintiffs from their seats and injuring them.

The jury returned verdicts in favor of defendant and against each plaintiff. Plaintiffs urged on their motion for a new trial that the trial judge committed prejudicial error in instructing the jury as follows:

"At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption and any evidence that may support the presumption, to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions on the burden of proof."

Question: Did the trial court commit prejudicial error in reading the foregoing instruction to the jury?

[1] This question must be answered in the affirmative. The law is settled that an instruction on "presumption of due care" should not be given when the party to the action is living and all circumstances of the accident are proved. (See Martindale v. Atchison, T. & S. F. Ry. Co., 89 Cal.App.2d 400, 413, 201 P.2d 48; Cole v. Ridings, 95 Cal.App.2d 136, et seq., 212 P.2d 597.)

[2] In the present case all parties to the action testified concerning the accident and there was no reason to give the instruction which was erroneous. Section 4½, Article VI of the Constitution of the state of California does not authorize an appellate court to reverse an order granting a new trial on the ground that instructions were erroneous where, as in the present case, it is presumed that the trial judge, pursuant to his duty, has weighed the evidence and is of the opinion that the error complained of has resulted in a miscarriage of justice. On appeal the appellate court must indulge the presumption that the trial judge performed his duty, considered the whole record in the case and decided that the giving of the instruction was prejudicial and resulted in a miscarriage of justice. (Nance v. Fresno City Lines, Inc., 44 Cal.App.2d 868, 872, 113 P.2d 244.)

In view of the foregoing rules, we cannot say that the implied conclusion of the trial judge, that the giving of the erroneous instruction resulted in prejudicial error, is not supported by the record. Therefore his order granting the motion for a new trial must be affirmed.

Affirmed.

MOORE, P. J. and WILSON, J., concur.

96 Cal.App.2d 178

PEOPLE v. CHAMBERLAIN et al.

Cr. 4405.

District Court of Appeal, Second District, Division 3, California.

Feb. 21, 1950.

Joseph H. Wright was convicted in the Superior Court, Los Angeles County, Clement D. Nye, J., for grand theft and he appealed.

The District Court of Appeal, Wood, J., held that the evidence was sufficient to sustain a finding of grand theft by false pretenses and also a finding of grand theft by trick and device.

Affirmed.

1. False pretenses 🔑9

In prosecution for grand theft by false pretenses, it is not necessary that the false pretenses be sole inducing cause of the owner parting with his money or property, and it is sufficient if it had a material influence, although owner was also induced by other causes.

2. False pretenses 🔑7(5)

The making of a promise with no intention of performing it or no bona fide belief in its possibility of performance, is a false representation of a present fact, that is, of the state of the promisor's mind.

3. False pretenses 🔑49(4)

Evidence that defendant represented that he owned a horse, that money from victim was to be used to fix a race, and defendant did not own horse and he admitted that he had no present intention of using money from victim to fix a race, was sufficient to support a finding of grand theft by false pretenses.

4. Larceny ⟹65

Evidence that defendant in receiving money from victim intended to appropriate it to his own use, instead of using it to fix a race, which was the intent victim had in delivering money, was sufficient to sustain a finding of grand theft by trick and device.

5. Larceny ⟹14(1)

Crime of "grand theft by trick and device" usually results when victim of a fraud intends not to pass complete title of his property, but that it shall be applied to a special purpose, while recipient of property intends to appropriate it to his own use.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Grand Theft by Trick".

◆

Gladys Towles Root, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Norman H. Sokolow, Deputy Attorney General, for respondent.

WOOD, Justice.

Appellant Wright and one Chamberlain were charged with grand theft. Trial was by jury. At the close of plaintiff's case, the information was dismissed as to Chamberlain upon motion of the district attorney. Wright was convicted, and he appeals from the judgment. He contends that the evidence was insufficient to support the judgment.

On January 18, 1949, while Leon Furra, the victim, was tending bar in his tavern known as the Paddock Cafe, and while defendants Chamberlain and Wright were sitting at the bar, as his customers, Chamberlain introduced Wright to Furra as the owner and trainer of horses. Wright gave Furra a card on which was printed "J. H. Wright, owner and trainer of thoroughbred horses." Wright told him that he owned the horse named "Exigen," and various other horses; and asked him if he ever bet the horses. When Furra replied that he did bet occasionally, Wright told him that he might have "something going" the next day and he would call Furra. The next morning Wright returned to the bar and told Furra that he had a race fixed that would be run that afternoon, that the race would be easy to fix because a certain jockey was not riding that day, and that he (Wright) would give Furra the information if Furra would give him $1100 as his contribution toward the fixing of the race. Wright said that Furra would not have any time to think it over because he (Wright) had to go to the track to take care of it. When Wright showed Furra his driver's license "registered" to his home address in Glendale, Furra went to his bank with Wright, in Wright's automobile, and withdrew $1100 in $100 bills. Before returning to the automobile, Furra "took down" the serial numbers of the bills. They returned to the tavern, and then Furra gave Wright the $1100, and Wright gave him the name of a horse. Then Wright told him to go to the track and bet $1500 on the horse to win, that it would probably pay four or five to one. Furra went to the track and bet $1500 on the horse to win, but it ran third.

The next morning Wright told Furra by telephone that the horse lost a shoe and the best they could do was to bring him in third, but "today" they had a long price horse that would make up for what Furra had lost. Then Wright said he would let Furra speak with jockey Allen Gray. Then another voice on the telephone said he was Allan Gray, and that "today they really had it all fixed"; and he told Furra to wire $1,000 to A. E. Gray in care of the North Hollywood Western Union, and as soon as they could confirm that the money was there they would give him the name of the horse. After that conversation Furra told a deputy sheriff what had happened. The deputy sent a telegram to the Western Union office in North Hollywood. That afternoon Wright told Furra by telephone that he had received confirmation that the money was there; and he gave Furra the name of a horse and told him to bet on it. Furra did not act on the information.

The next morning, January 21, 1949, Wright telephoned Furra and asked how he had done, and Furra replied that he had bet on the horse but had not made anything. Then Wright said he really had a longshot horse, and he told Furra to deliver $1400 in an envelope marked Joseph Wright or J. P. Wright to the Coliseum Hotel, and that as soon as he received confirmation that the envelope was there he would give the name of the horse. Furra then telephoned the sheriff's office, and two officers went to Furra's tavern. The officers and Furra put some coin wrappers, which were cut to the size of currency, in an envelope, and on that day Furra delivered the envelope to the clerk at the Coliseum Hotel, who placed it in the mail box behind the desk. On that same date Wright rented a room at that hotel, and told the clerk that he was expecting an envelope and asked him to hold it until he returned. The two officers went to the hotel and saw the envelope in the mail box. Then they went into the hotel office and awaited the arrival of Wright. When Wright called for the envelope the manager of the hotel handed it to him, and then the officers took the envelope from Wright.

An officer searched Wright and found a $100 bill in his coat pocket. The serial number of that bill was a number that was on a list of serial numbers which he (the officer) had obtained from Furra. In a conversation with three officers, Wright said he knew why he was arrested; that he had been advised ten years ago to get out of that racket; that he accepted the $100 bill as one of eleven that he had obtained from Furra; that he alone got the $1100; that it was "supposedly to fix a horse race," but "Nobody can fix a race"; that he gave a business card, with the name "Joe H. Wright, Stock Farm in Burlingame" on it, to Furra; that the card was fictitious and he had it printed; that he spent the money, which he had obtained from Furra, to pay personal debts, buy clothes, and bet on races.

Allen Gray, a jockey, testified that he was not acquainted with Wright or Chamberlain; that he did not have any conversation with Furra at Wright's request; and that he never received any money from Wright or Chamberlain.

Edward Wright (not the defendant) testified that he was an owner of race horses and that he owned the horse "Exigen" about three years; and that he did not know defendant Wright or Chamberlain; and that he never used a card with the name "J. H. Wright" on it.

The assistant secretary of the California Horse Racing Board testified that Joseph H. Wright had never been licensed by the State Racing Commission.

Furra testified that he relied upon Wright's statement that the $1100 was to be used in fixing the race; that he parted with the $1100 in reliance on that statement, "or else I would not have given him eleven hundred dollars"; and that no part of the money was returned to him. On cross-examination he testified that he believed 100% that the race could be fixed; that there was no arrangement to get his money back if the fix did not go through, but if he had not believed Wright he would not have given him the money; that Wright assured him that the horse would win, and he (Furra) believed it or else he would not have given him the money; that when he gave Wright the $1100 he was not sure that Wright was going to fix the race, but he was taking Wright's word for it; that everything is a gamble to a certain extent, but if "I wasn't sure do you think I would hand anybody $1100 and let him take off with it"; that he gave Wright the $1100 because Wright told him that he was going to fix a race; and if he had not been sure that Wright had given him the right information he would not have given him the money. Wright did not testify, and he did not present any evidence.

[1-3] Appellant asserts that since the title to the money passed to appellant the only type of grand theft allegedly involved here is grand theft by false pretenses. He argues that Furra did not rely upon the representations of appellant. As above shown, Furra testified that he believed that appellant had given him the right information; that he relied on appellant's statement that the money was to be used in fixing the race and that he would

not have parted with the $1100 if he had not relied on that statement. The evidence was sufficient to support a finding that Furra relied upon the representations of appellant. It is not necessary "that the false pretenses be the sole inducing cause of the owner parting with his money or property. It is sufficient if it had a material influence, although he was also induced by other causes." People v. Steffner, 67 Cal.App. 1, 13, 227 P. 690, 696; see also People v. Chait, 69 Cal.App.2d 503, 514, 159 P.2d 445. Appellant also asserts that grand theft by false pretenses was not proven for the further reason that the representations did not relate to a past or existing fact. The statement of appellant to Furra that he, appellant, owned the horse named "Exigen" and various other horses was a representation of an allegedly existing fact. The representation was false, and the jury could have found that the representation was a material factor in inducing Furra to deliver his money to appellant. Appellant told Furra that the money was to be used to fix a race. He (appellant) used it for other purposes, as above shown. He told the officers that he knew a race could not be fixed. The jury could have found that, at the time he obtained the money, he had no present intention of using it to fix a race. If he had no such intention then his representation as to his present intention was a misrepresentation of an allegedly existing fact and was not merely a prediction or opinion regarding a future event. See People v. Ames, 61 Cal.App.2d 522, 531–532, 143 P.2d 92. In People v. Cravens, 79 Cal.App.2d 658, it was said at page 664, 180 P.2d 453, at page 457: "The theory has been advanced in two recent decisions that, as in civil actions for fraud, the making of a promise with no intention of performing it or no bona fide belief in its possibility of performance, is a false representation of a present fact, i.e. of the state of the promisor's mind." The evidence was sufficient to support a finding of grand theft by false pretenses.

[4, 5] Also, the evidence was sufficient to support a finding of grand theft by trick and device. In People v. McCabe, 60 Cal.App.2d 492, it was said at page 496, 141 P.2d 54, at page 57, that the crime of grand theft by trick and device "usually results when the victim of a fraud intends not to pass complete title of his property but that it shall be applied to a special purpose while the recipient of the property intends to appropriate it to his own use." Furra, in delivering the money to appellant, intended that the money should be used to fix a race. Appellant, in taking the money, intended to appropriate it to his own use and he did so appropriate it.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

96 Cal.App.2d 197

METZENBAUM v. METZENBAUM et al.
(two cases).

Civ. 17134.

District Court of Appeal, Second District,
Division 2, California.

Feb. 23, 1950.

Action by Walter Metzenbaum against Murray Metzenbaum and others for dissolution of a partnership and for an accounting, wherein Murray Metzenbaum filed cross-complaint against Walter Metzenbaum, Rose Metzenbaum and others.

The Superior Court, Los Angeles County, Charles S. Burnell, J., rendered judgment in favor of Murray Metzenbaum, and Walter Metzenbaum and others appealed.

The District Court of Appeal, McComb, J., held that questions of sufficiency of evidence to sustain findings could not be considered because appellant's brief failed to make reference to pages where evidence on point could be found in record.

Affirmed.

1. Appeal and error 🔑760(2)

Where it is contended that evidence does not sustain trial court's findings of fact, appellant must point out in his brief the evidence and must show wherein the evidence does not sustain the findings.

2. Appeal and error ⚿760(2)

Appellate court cannot be required to search through a voluminous record to discover evidence on a point raised by appellant when his brief makes no reference to pages where evidence on the point can be found in record.

3. Appeal and error ⚿760(3)

Where principal appellant was an attorney at law who had practiced for more than 40 years, and appellants' brief failed to give references to pages where evidence could be found, contention that the evidence was insufficient to sustain certain findings would not be considered.

4. Appeal and error ⚿201(2)

Where harmful result of misconduct of trial judge can be obviated by bringing the matter to his attention, as a predicate to claiming error on appeal an assignment of such misconduct must be made in the trial court.

5. Appeal and error ⚿201(2)

Trial judge's remarks when ruling on attempt to amend pleadings and the excusing of a witness subject to be recalled by telephone was not so clearly prejudicial as to justify reversal where matter had not been called to attention of trial judge.

6. Appeal and error ⚿204(1)

Where appellants failed to point out alleged erroneous rulings on admission of evidence, appellate court will not search record to discover them.

7. Appeal and error ⚿756

Where error on rulings on admission of evidence is alleged but no citation of authorities or argument in support thereof is made on appeal, error will not be considered.

◆

Walter Metzenbaum, Bakersfield, for appellants.

Milton A. Krug and Leon B. Brown, Los Angeles, for respondent.

McCOMB, Justice.

Plaintiff filed an action against defendants seeking dissolution of a partnership and an accounting. Defendant Murray Metzenbaum filed a cross-complaint involving the same properties and partnership transactions referred to in the complaint. The trial court found in favor of defendant and cross-complainant Murray Metzenbaum and against plaintiff and cross-defendants (appellants herein).

Appellants question the sufficiency of the evidence to sustain numerous findings of fact of the trial court, but fail to point out wherein the evidence fails to sustain the questioned findings. Likewise appellants fail in their opening brief to give any references to the transcript of proceedings in the lower court which consists of 1044 pages in the reporter's transcript.

[1, 2] When it is contended that the evidence does not sustain the trial court's findings of fact, the appellant must point out in his brief the evidence, and must show wherein the evidence does not sustain the findings. (Sutro Heights Land Co. v. Merced Irr. Dist., 211 Cal. 670, 687, 296 P. 1088; Wieczorek v. Texas Co., 45 Cal.App.2d 450, 457, 114 P.2d 377. Cf. People v. Corlett, 67 Cal.App.2d 33, 50, 153 P.2d 595, 964; Hughes v. Grandy, 78 Cal.App.2d 555, 568, 177 P.2d 939.) Likewise an appellate court cannot be expected to search through a voluminous record to discover evidence on a point raised by appellant when his brief makes no reference to the pages where the evidence on the point can be found in the record. (Wills v. Woolner, 21 Cal.App. 528, 530, 132 P. 283.)

[3] These rules are not merely so-called technical rules of procedure. They are designed (1) to facilitate the disposition of litigation before the appellate courts, and (2) to save appellants from unnecessary expense in taking appeals, preparing records and printing briefs. The present case is an excellent example of the soundness of these rules of procedure. A cursory exam-

ination of the record discloses that there is substantial evidence to sustain each and every questioned finding. Had appellants complied with the rules it would have at once been apparent to them that their attack upon the questioned findings was futile, and they would have saved themselves expense and conserved the time of this court. (Cf. Imperial Water Co. No. 4 v. Meserve, 62 Cal.App. 593, 217 P. 548; Id; 62 Cal. App. 603, 217 P. 553.) Nor is the application of the rule in this case to be waived on the often heard statement that: "It is unfair to penalize the client because of the dereliction of his attorney." In the present action the principal appellant is an attorney at law who has practiced for more than forty years and in several states. Therefore, since appellants have failed to comply with the above stated rules, we will not consider the first question raised, to wit, that the evidence is insufficient to sustain certain findings of fact.

[4] Appellants next contend that the trial judge by certain remarks made during the course of the trial indicated his bias and prejudice against them. In none of the instances of which appellants complain did they assign the alleged misconduct of the trial judge as error. If the harmful result of the misconduct of the trial judge can be obviated by bringing the matter to his attention, as a predicate to claiming error on appeal, an assignment of such misconduct must be made in the trial court. (Church v. Payne, 36 Cal.App.2d 382, 400, 97 P.2d 819)

[5] We have examined the various comments which appellants claim were prejudicial and find that in no instance was the remark of the trial judge of a nature the prejudicial effect of which could not have been removed if the matter had been called to his attention. We cite two examples:

(1) The following occurred when appellants sought to file an amended pleading:

"The Court: Well, let us find out first if there is any objection to it. Mr. Krug: We object, Your Honor, on the ground it has not come timely, and it is entirely new and different as a cause of action. * * * The Court: I can't see that it is very fair either. You started this suit in July 1946. It is no excuse that you don't know what the law is. You are supposed to a lawyer, aren't you? Mr. Metzenbaum: I am a lawyer; not supposed to be. (Argument.) I would ask that Your Honor withhold ruling on the motion until the evidence is in. The Court: Oh! No. I pass on things as they come in. If I permitted you to file at this very late date, it would result in the case having to go off calendar, because the pleadings had become unsettled, and the other side would be allowed ten days to answer."

(2) It was suggested during the course of the trial that a witness named Arnold might be excused subject to being recalled by telephone. At such time the following occurred:

"The Court: Now is that all you have of Mr. Arnold? Mr. Metzenbaum: Yes, sir. I just want this admitted. The Court: Any cross? Mr. Krug: May it please the Court, we will need Mr. Arnold in the proof of the counter claim. I don't suppose Your Honor wants this proof to go in piecemeal. The Court: Can't we do this? I assume there is no cross-examination on Mr. Arnold's testimony to date, because all he has done is identify his signature on letters. Why not have him come by telephone call when you need him? Mr. Krug: Would you be available on telephone call, Mr. Arnold? A. Yes, sir. The Court: There is no use keeping him around. He took a nice little nap on the witness stand when he wasn't testifying, but he can't make any money doing that."

Though the trial judge's comments may not have been in the best taste they are clearly not prejudicial to appellants.

[6, 7] Finally appellants contend that certain rulings of the trial court pertaining to the admission of evidence were erroneous. However they fail to point out the rulings or the evidence of which they complain. When appellants fail to point out alleged erroneous rulings on the admissibility of evidence the appellate court will not search the record to discover them.

(Humphrey v. Star Petroleum Company, 110 Cal.App. 15, 293 P. 692.) Also where as in the instant case error in rulings on the admission of evidence is alleged but no citation of authorities or argument in support of which is made on appeal, the error will not be considered. (Todd v. Meserve, 93 Cal.App. 370, 390, 269 P. 710.)

Applying the foregoing rules we deem that appellants have waived any alleged errors in rulings on the admission of evidence.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

34 Cal.2d 749

GONZALES v. PACIFIC GREYHOUND LINES et al.

S. F. 17938.

Supreme Court of California, in Bank.
Feb. 21, 1950.

Rehearing Denied March 20, 1950.

Kenneth David Gonzales, a minor, by Jeraldine Gonzales, his guardian ad litem, brought action for wrongful death against Pacific Greyhound Lines, a corporation, and others.

The Superior Court of Monterey County, A. M. Runnells, J., who was assigned by Chairman of Judicial Council, rendered a judgment for defendants, and the plaintiff appealed.

The Supreme Court, Spence, J., held that defendants were precluded by statute from challenging plaintiff's status as deceased's legitimate son, that interlocutory divorce decree was not admissible, that failure to give certain instruction on behalf of plaintiff was prejudicial error, that cross-examination of plaintiff's mother was prejudicial error, and that exclusion of stipulation by defendants of liability at prior trial was reversible error.

Judgment reversed.

Prior opinion, 209 P.2d 598.

1. Bastards 🔑3

Defendants in wrongful death action, who were neither husband nor wife nor descendants of either, could not challenge legitimacy of plaintiff who was born almost eight months after marriage of his mother and decedent who was not impotent, and who had lived with plaintiff's mother as her husband from date of marriage until several months after plaintiff's birth, regardless of whether presumption of plaintiff's legitimacy was conclusive or disputable. Code Civ.Proc. § 1962, subd. 5, § 1963, subd. 31; Civ.Code, §§ 193, 195.

2. Divorce 🔑308

Though divorce decree reciting that divorced husband should not be required to contribute to support of child born almost eight months after marriage, stood as a final adjudication between husband and wife on issues there submitted, child was not bound by the determination of his status therein, and in action by the child for the death of the deceased husband, divorce decree was not admissible to challenge either child's relationship to the divorced husband or child's right to recover damages as an heir of deceased husband.

3. Appeal and error 🔑1067

Where defendants in wrongful death action, who were neither husband nor wife nor descendants of either, could not challenge legitimacy of plaintiff who was born almost eight months after marriage of his mother and deceased, trial court's failure to charge that plaintiff was conclusively presumed to be legitimate, was prejudicial error. Code Civ.Proc. § 1962, subd. 5, § 1963, subd. 31; Civ.Code, §§ 193, 195.

4. Witnesses 🔑383

Impeachment of a witness must be confined to material points and cannot be directed to collateral matters.

5. Appeal and error 🔑1048(6)
Witnesses 🔑383

Where there was a conclusive presumption in death action that plaintiff was legitimate, though born less than eight months after marriage of plaintiff's mother and her deceased husband, it was reversible error to permit defendants to cross-examine plaintiff's mother, for purpose of impeachment, as to her testimony in divorce action that deceased husband was not the father of the plaintiff.

6. Appeal and error 🔑1056(1)
Stipulations 🔑19

In wrongful death action, exclusion of defendants' stipulation, made without limitation at prior trial, admitting liability was error prejudicial to plaintiff, in absence of request by defendants to be relieved from stipulation or a showing of cause for such relief.

7. Stipulations 🔑19

Where a stipulation is distinctly and formally made for express purpose of relieving opposing party from proving some fact, and no provision is made by its terms indicating a limitation of scope or duration of its effect, that admission can be introduced in evidence and is available on a subsequent trial of the same action, unless court permits its withdrawal on proper application therefor.

8. Stipulations ⚷13

Relief from a stipulation on a prior trial may be granted in trial court's discretion, where facts stipulated have changed, or there is fraud, mistake of fact, or other special circumstance rendering it unjust to enforce the stipulation.

9. Stipulations ⚷14(1)

Statement of defendants' counsel, in discussing with plaintiff's counsel issues to be contested on second trial, that they were not going to admit liability, did not affect binding character of stipulation of liability at prior trial, in absence of an order of the trial court procured in an affirmative application for such relief on a showing of circumstances constituting cause therefor.

◆

Robert G. Partridge, San Francisco, Noland & Lawson, Salinas, and Wallace O'Connell, San Francisco, for appellant.

Hoge, Pelton & Gunther, Leo V. Killion and Reginald M. Watt, San Francisco, for respondents.

SPENCE, Justice.

This is an action for damages for the wrongful death of Ralph Daniel Gonzales. It was originally commenced by Jeraldine Gonzales, as surviving widow, and Kenneth David Gonzales, a minor, claiming to be the son of the decedent. William Gonzales, admittedly the son of the decedent by a previous marriage, was permitted to intervene in the action. The decedent was killed on February 11, 1946, when his taxicab crashed into a Greyhound bus that had skidded out of control and was blocking the highway a short distance above a sharp turn around which the decedent, coming from the opposite direction, traveled to the point of impact.

The action has been twice tried. On the first trial, which was before the court without a jury, the defendants stipulated as to liability for the accident, leaving for determination only the issues of heirship and the amount of damages. By the judgment entered at the conclusion of that trial, the widow was awarded funeral expenses and William Gonzales recovered the sum of $1,800, but Kenneth David Gonzales was allowed nothing, the court finding that he was not the child of the decedent. Plaintiff Kenneth David Gonzales thereupon moved for a new trial, and it was granted upon the court's statement that "the evidence [was] insufficient to justify" its finding in negation of plaintiff's paternity claim since section 195 of the Civil Code provides that "the presumption of legitimacy of children born in wedlock can only be disputed by the husband or wife or descendant of one or both of them and the Pacific Greyhound Lines is not in that class."

The second trial, which was confined solely to the rights of plaintiff Kenneth David Gonzales, was had before a jury. The trial court, over plaintiff's objection, permitted defendants to introduce evidence in challenge of his legitimacy, and it refused plaintiff's offer of defendants' stipulation on the first trial in admission of their liability for the accident. The jury returned a verdict in favor of defendants. From the judgment accordingly entered, plaintiff appeals, contending that the said two major rulings of the trial court were prejudicially erroneous. His position is well taken on both points in the light of the record and the law applicable thereto.

[1] Plaintiff presented evidence which entitled him to claim the presumptions of legitimacy as controlling in his favor. Thus it was indisputably established that Jeraldine Gonzales and the decedent were married on December 11, 1942; that plaintiff was born on August 2, 1943; that the decedent was not impotent; and that the decedent and Jeraldine Gonzales had lived together as husband and wife from the date of their marriage up to several months after the birth of plaintiff. Accordingly, it becomes immaterial whether the presumption of plaintiff's legitimacy be con-

sidered conclusive, Code Civ.Proc. sec. 1962, subd. 5, or disputable, Code Civ.Proc. sec. 1963, subd. 31; see, also, Civ.Code, sec. 193, for defendants would not be in a position to argue the point.

Even where the presumption of legitimacy is a disputable one, challenge can be made "only by the husband or wife, or the descendant of one or both of them." Civ.Code, sec. 195. By reason of this statutory limitation, the following persons have been barred from questioning the legitimacy of a child born in wedlock: the state in a criminal prosecution for nonsupport of an alleged illegitimate child, In re Madalina, 174 Cal. 693, 695-696, 164 P. 348, 1 A.L.R. 1629; the beneficiaries named by the will of the deceased husband, bearing no relation to the testator but opposing the claim of his alleged daughter as a pretermitted heir, In re Estate of Lee, 200 Cal. 310, 314, 253 P. 145; collateral heirs of the decedent contesting distribution of the estate to his daughter as sole heir, In re Estate of McMurray, 114 Cal.App. 439, 442, 300 P. 72; the unmarried father seeking determination of the parentage of the child born to the mother while married. Serway v. Galentine, 75 Cal.App.2d 86, 89, 170 P.2d 32. Likewise here, defendants are not within the class enumerated in the statute and so are foreclosed from inquiry as to plaintiff's legitimacy. As was said in Re Madalina, supra, 174 Cal. at page 696, 164 P. at page 350: "This is the declared policy of this state and is simply the adoption of a rule prevailing generally in all civilized communities."

The record reveals that the trial court, despite the provisions of section 195 of the Civil Code, deemed that the nature of defendants' controverting evidence, as embraced in an interlocutory decree of divorce between the decedent and Jeraldine Gonzales, made it proper for defendants to contest plaintiff's legitimacy. That litigation, as it herein appears, may be summarized as follows: In 1944 the parties in their respective divorce pleadings each alleged that plaintiff was the issue of their marriage. Apparently the action was uncontested and the divorce was awarded to the wife on the ground of extreme cruelty. At the hearing she testified that the decedent was not the father of plaintiff, and the trial court, upon so finding in pursuance of her testimony, included in the interlocutory decree a provision awarding plaintiff's custody to her and reciting that the decedent should not be required to contribute to plaintiff's support. No final decree was ever entered, the wife, Jeraldine Gonzales, explaining that several reconciliations undertaken with the decedent were followed by successive separations, and adding that up to the time of his death he contributed intermittently to plaintiff's support. She also stated on both the first and second trials of this action that her testimony in the divorce proceedings with respect to the paternity issue affecting the status of the child was false and was given because she feared that otherwise the trial court might award the custody of plaintiff to the decedent. At the time of the divorce proceedings, she was but seventeen years of age.

[2] While the interlocutory decree stood as a final adjudication between the husband and the wife on the issues there submitted, Leupe v. Leupe, 21 Cal.2d 145, 148, 130 P.2d 697; Borg v. Borg, 25 Cal. App.2d 25, 29, 76 P.2d 218; In re Estate of Hughes, 80 Cal.App.2d 550, 555, 182 P.2d 253, plaintiff was not a party to that litigation and he was not bound by the determination of his status therein. In re Estate of Walker, 176 Cal. 402, 412, 168 P. 689. The absence of a support order in the divorce decree stemmed wholly from a finding of non-paternity, and there would have been no legal basis for holding the husband liable in that action for the child's support. Such decree would in nowise be material here on the issue of plaintiff's right to recover for the pecuniary loss he claims to have sustained as the result of the decedent's death. See Davis' Administrator v. Cincinnati, New Orleans and Texas Pacific Railway Company, 172 Ky. 55, 188 S.W. 1061, 1063, Ann.Cas.1918E, 414; Note Ann.Cas.1918E, p. 419. Accordingly, the interlocutory decree of divorce was not admissible for any purpose in this action—in challenge either of plaintiff's relationship to the deceased or of his right

to recover damages consistent with his heirship claim herein.

[3] Moreover, the trial court's instructions served to accentuate its error with regard to the relevancy of the divorce proceedings. Without detailing the instructions on the point, it is sufficient to state that they reflect the trial court's view that plaintiff's paternity claim was an open, controvertible issue for the jury's determination from the evidence as above outlined. But since defendants were precluded, under the circumstances shown by the uncontradicted evidence, from challenging plaintiff's legitimacy, and as to them, he was in legal effect conclusively presumed to be legitimate, plaintiff was entitled to an instruction plainly stating that fact to the jury in support of his heirship claim in this action. The trial court's failure to so charge constituted error of a most prejudicial nature.

[4, 5] In line with these observations, there remains one further point to be noted. During the second trial of this case, plaintiff's mother was subjected to interrogation by defendants' counsel relative to statements that she had made in the divorce proceedings concerning the legitimacy of plaintiff. Such line of inquiry proceeded upon the theory that it constituted impeachment of her testimony in this action in support of plaintiff's heirship claim as the legitimate child of the deceased. However, impeachment of a witness must be confined to material points and cannot be directed to collateral matters. 27 Cal.Jur. sec. 125, p. 152; In re Estate of Gird, 157 Cal. 534, 548, 108 P. 499, 137 Am.St.Rep. 131; People v. Pianezzi, 42 Cal.App.2d 270, 278, 108 P.2d 685. Since defendants were precluded here from raising the issue of plaintiff's legitimacy, any attempt to impeach plaintiff's mother on the basis of prior inconsistent statements made by her with respect to plaintiff's status would be wholly immaterial and irrelevant to the determination of plaintiff's right of recovery and would allow defendants, under the guise of attacking her credibility, to present collateral matter to the jury which could operate only to plaintiff's serious prejudice. In such circumstances the cross-examination of plaintiff's mother as undertaken by defendants' counsel exceeded proper limits, and plaintiff's objection thereto should have been sustained.

[6] Likewise available to plaintiff as ground for reversal of the judgment herein is the trial court's refusal to admit into evidence the stipulation as to liability made by defendants on the first trial. Pertinent to this point is the following excerpt from those proceedings as contained in the present record: "Mr. Noland [counsel for plaintiff]: I have been advised—I think I am correct that you stipulate to liability? Mr. Hoge [counsel for defendants]: Yes, as to the facts surrounding the happening of the accident."

In chambers and before the taking of any testimony on this second trial, plaintiff's counsel offered in evidence this admission of liability and claimed the benefit thereof in disposition of that issue. The record of the first trial as to this agreement between counsel dispensing with proof of the admitted fact shows that it was made without limitation. On the second trial defendants made no application for relief from the effect of their stipulation nor showed any cause for such consideration. Rather defendants' counsel simply asserted a change of position and objected to the competency of the stipulation as evidence, upon the theory that it had no binding force beyond the first trial. With this proposition the trial court agreed and so ruled in the defendants' favor.

[7, 8] It is the general rule that where a stipulation is distinctly and formally made for the express purpose of relieving the opposing party from proving some fact, and no provision is made by its terms indicating a limitation of scope or the duration of its effect, that admission can be introduced in evidence and is available upon a subsequent trial of the same action, unless the court permits its withdrawal upon proper application therefor. Wigmore on Evidence, 3d Ed., Vol. IX, sec. 2593, p. 593; see anno. 100 A.L.R. 775; Nathan v. Dierssen, 146 Cal. 63, 65-66, 79 P. 739; Andrew v. Bankers' & Shippers' Ins. Co.,

125 Cal.App. 24, 27-28, 13 P.2d 515; Crenshaw v. Smith, 74 Cal.App.2d 255, 267, 168 P.2d 752. For an effective discussion and review of the law on this subject as it prevails in this state, it will suffice to refer to the recent case of Richfield Oil Corp. v. State Board, 329 U.S. 69, where in footnote 1, page 73, 67 S.Ct. 156, 159, 91 L.Ed. 80, the following observations are made: "In California a valid stipulation is binding upon the parties. McGuire v. Baird, 9 Cal.2d 353, 70 P.2d 915; Webster v. Webster, 216 Cal. 485, 14 P.2d 522; see 23 Cal. Juris. 826. It is available at a second trial unless in terms otherwise limited, Nathan v. Dierssen, 146 Cal. 63, 79 P. 739; Crenshaw v. Smith, 74 Cal.App.2d 255, 168 P. 2d 752; see Le Barron v. City of Harvard, 129 Neb. 460, 262 N.W. 26, 100 A.L.R. [767], 775, and will be controlling at the second trial unless the trial court relieves a party from the stipulation. First National Bank v. Stansbury, 118 Cal.App. 80, 5 P.2d 13. Relief from a stipulation may be granted in the sound discretion of the trial court in cases where the facts stipulated have changed, there is fraud, mistake of fact, or other special circumstance rendering it unjust to enforce the stipulation. Sacre v. Chalupnik, 188 Cal. 386, 205 P. 449; Back v. Farnsworth, 25 Cal.App.2d 212, 77 P.2d 295; Sinnock v. Young, 61 Cal.App.2d 130, 142 P.2d 85; see 161 A.L. R. 1163. In the present case there is no intimation in the record or briefs of fraud, excusable neglect, or other ground for relief."

[9] While as noted in the above quotation, relief from an unqualified stipulation of facts may be had in a proper case, defendants' objection here to the admission of their previous stipulation on the liability issue was not, in terms or effect, an application to be relieved therefrom through the exercise of judicial discretion by the trial court, but was an unconditional challenge to its competency and binding force in subsequent litigation. The trial court ruled in accordance with defendants' theory as to the legal effect of the stipulation and rejected it as competent evidence on the second trial. Since defendants' argument as made in no manner invoked the discretion and powers of the trial court on the subject of their right to withdraw from the stipulation admittedly made on the first trial, the decision on the point here cannot be correlated with those considerations as a factor of support. Nor does it matter whether or not defendants' counsel, in discussing with plaintiff's counsel the issues to be contested on the second trial, stated that "we [are] not going to admit liability," for the mere notice of a change of position would not affect the binding character of the stipulation by reason of its unlimited terms, in the absence of an order of the trial court procured in an affirmative application for such relief upon a showing of circumstances constituting cause therefor. Herbst v. Vacuum Oil Co., 68 Hun. 222, 22 N.Y.S. 807, 808. As the record here stands, the conclusion is inescapable that the trial court, in denying the reception in evidence and the controlling effect of the stipulation on the issue of liability, committed error prejudicial to plaintiff.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur

34 Cal.2d 757

PEOPLE v. SAMPSELL.

Cr. 5021.

Supreme Court of California, in Bank.

Feb. 21, 1950.

Rehearing Denied March 20, 1950.

Lloyd Edison Sampsell, also known as Lloyd Edison Sampsel, was convicted in the Superior Court of San Diego County, William A. Glen, J., of murder, assault with a deadly weapon with intent to murder, and robbery in the first degree, and he appealed.

The Supreme Court, Carter, J., held that the instructions accorded a fair and impartial trial, that certain arguments of the district attorney were improper but not prejudicial and that evidence sustained conviction of murder in the first degree and of robbery in the first degree.

Judgment affirmed.

1. Criminal law ⚿768(4)

In prosecution for murder, assault with intent to murder, and robbery, instructions which among other things required jury to impose lesser of two penalties if any individual juror entertained a reasonable doubt concerning the penalty to be imposed and which stated that if jury should fix penalty as death the jury should not specify the death penalty in the verdict, did not usurp discretion of jury. Pen.Code, §§ 189, 190; Const. art. 1, § 7.

2. Criminal law ⚿1037(1, 2)

If argument by district attorney that automatic appeal is taken in case death penalty is imposed was regarded as improper, objection should have been made during course of trial with request for admonition to the jury.

3. Criminal law ⚿1186(4)

Whether misstatement of law by district attorney in argument is prejudicial depends upon particular facts of case. Pen.Code, § 3046; Const. art. 6, § 4½.

4. Criminal law ⚿1186(4)

Misstatement of law by district attorney in argument that average life-term in California is less than seven years was not prejudicial. Pen.Code, § 3046; Const. art. 6, § 4½.

5. Criminal law ⚿726, 1171(1)

Remarks in argument by district attorney as to function of Supreme Court in case of automatic appeal from death sentence and remarks concerning probability of parole were improper even if invited but were not ground for reversal in view of clear evidence of guilt. Pen.Code, § 3046.

6. Homicide ⚿253(6)
Robbery ⚿24(1)

Evidence sustained conviction of murder in the first degree and of robbery in the first degree.

7. Criminal law ⚿822(1)

In prosecution for murder, assault with intent to murder, and robbery, instructions viewed as a whole accorded defendant a fair and impartial trial.

Lloyd Edison Sampsell, in pro. per., and J. Oscar Goldstein, Chico, under appointment by the Supreme Court, for appellant.

Fred N. Howser, Attorney General, Walter L. Bowers, Assistant Attorney General, for respondent.

CARTER, Justice.

The defendant, Lloyd Edison Sampsell (also known as Lloyd Edison Sampsel) was tried by jury and found guilty of (1) the murder of Arthur W. Smith; (2) assault with a deadly weapon with intent to murder one Harley Cook; and (3) robbery in the first degree. To the first two counts of the indictment (murder and assault with a deadly weapon with intent to commit murder) the defendant pleaded not guilty; as to the third count (robbery) he stood mute and the court entered the plea of not guilty for him. During the course of the trial, however, the defendant took the stand in his own behalf and admitted that he had planned to, and did in fact, rob the Seaboard Finance Company, a corporation, located in San Diego.

On the morning of March 27, 1948, the defendant and a companion (Clarence [Ben] Richardson) went to the offices of the Seaboard Finance Company at Second and B Streets in San Diego for the admitted purpose of robbery. The defendant was armed with a gun which he exhibited to the employees forcing them to turn over the contents of the cash drawers to him. He then demanded that the manager open the safe and when the manager protested that he could not do so, one of the young women employees volunteered to do so. The defendant admitted that she had every reason to fear violence from him. After the defendant had taken the money from the safe and was on his way out of the office, Mr. Smith, a customer, came out of one of the loan booths and started for the door which defendant had reached first. Smith tried to pass the defendant who refused to let him go. Cook, an employee, seeing the situation, grabbed Sampsell's hands at the wrists and tried to push him past Smith. Smith then got a hold on Sampsell's neck and head. It was at this point that the shooting occured. Sampsell fired three shots, one of which killed Smith, and another wounding Cook. Sampsell got out of the building and ran part way up the block with two of the employees, the manager and assistant manager, in pursuit. Sampsell, after turning to fire at his pursuers, then jumped on the running board of a car driven by a Mr. Bootman and shot his gun directly into the car thereby causing a collision with another car. Sampsell then commandeered another car, and at the point of his gun, ordered the driver to proceed in the same direction. He jumped off the running board at First and Broadway and ran into a bus depot and was lost in the crowd. He was apprehended almost a year later in Phoenix, Arizona.

Defendant testified voluntarily and freely in his own behalf, telling of the robbery in narrative form, and insisted on relating his entire criminal record although he was informed that it was not necessary for him to do so. He makes no contention that the evidence does not support the verdict, with the exception of the count as to assault with intent to commit murder. His theory is that because of certain errors in the giving of certain instructions and the failure to give others, and because of misconduct on the part of the district attorney, he has been deprived of due process of law and the equal protection of the law. It appears that the deprivation complained of is the possibility that, except for the errors, the jury might have recommended life imprisonment rather than returning a verdict finding him guilty of murder in the first degree without recommendation.

It is contended that the trial court erred, in that the jury was not plainly instructed that its verdict must be unanimous, not only as to guilt and degree, but as to the penalty to be imposed, and that the failure to so instruct deprived him of his right to trial by jury as guaranteed by the Constitution of the United States and Article I, Section 7 of the Constitution of the State of California.

The applicable instruction, as given, is as follows:

"Murder is classified into two degrees, and if you should find the defendant guilty of murder, it will be your duty to determine the degree of the offense, that is, whether first or second degree.

"Before you may return a verdict in this case, you must agree unanimously not only as to the innocence or guilt of the defendant, but also, if you should find him guilty, as to the degree of his offense.

"Although there are two degrees of murder, the evidence in this case is such that either the defendant is innocent of the charge of murder or he is guilty of murder in the first degree, for murder which is committed in perpetration of a robbery is murder of the first degree, whether the killing was intentional, unintentional or accidental.

"The law of this state provides that every person guilty of murder in the first degree shall suffer death or confinement in the state prison for life, at the discretion of the jury that finds him guilty. If you should find the defendant guilty of murder in the first degree, it shall be your duty to determine which of the two penalties shall be inflicted, the death penalty or confinement in the state prison for life. If you should fix the penalty as confinement in the state prison for life, you will so indicate in your verdict, using the form that will be handed to you when you retire to deliberate, but if you should fix the penalty as death, you will not specify the death penalty in the verdict. In determining which punishment shall be inflicted, you are entirely free to act according to your own judgment.

"If any individual juror, or the jury as a whole, entertains a reasonable doubt as to which one of two or more punishments should be imposed, it is your duty to impose the lesser of the two." (Emphasis added.)

In this connection, the defendant contends that he has been prejudiced because the jury did not expressly state the penalty to be imposed. (See instruction set forth above.) He states that section 190 of the Penal Code provides that "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same; * * *" and that it is unconstitutional, as construed by this court, in that persons in the same class may be sentenced to death either expressly by the jury, or by implication from the silence of the jury as to penalty. He also contends that where the jury has been instructed to remain silent as to the penalty to be imposed there can be no certainty as to its unanimity in that respect. The following portion of the instruction is said to be a usurpation of the discretion of the jury: "If you should fix the penalty as death you will not specify the death penalty in the verdict."

The *same* instruction, with one immaterial exception, as that given by the trial court as to the form of verdict, was requested by the attorney for the defendant and "refused as covered." After the sentence reading "* * * but if you should fix the penalty as death, you will not specify the death penalty in the verdict," defendant's request contained the following sentence *"and you will say nothing about punishment in the verdict."* (Emphasis added.) There was no request by the defendant for an instruction that the verdict as to penalty (or as to guilt or degree) must express the unanimous decision of the jury, although such an instruction was given by the court. There was a request that the jury be polled as to its verdict on the murder count, and on the count of assault with intent to commit murder. As to both counts, the poll showed a unanimous jury. Polling was waived by the prosecution and the defense as to the robbery count.

[1] It would seem that in the present case, even under the view taken by a minority of this Court (see dissenting opinions, People v. Williams, 32 Cal.2d 78, 195 P.2d 393) the penalty was left entirely to the discretion of the jury as provided in Penal Code, section 190. The trial court instructed the jury that it was its duty to impose the lesser of the two penalties if *any individual juror entertained a reasonable doubt concerning the penalty to be imposed.* Andres v. United States, 333 U.S. 740, 68 S.Ct. 880, 885, 92 L.Ed. 1055, relied upon by defendant, presents a different state of facts. The jury, in that case, was told: "And, finally, you will recall I said that you are instructed that before you may return a qualified verdict of murder in the first degree without capital punishment, that *your decision to do so must, like your regular verdict, be unanimous.*" (Emphasis added.)

By the defendant's own admissions, he was engaged in an armed robbery. There is no question but that Arthur W. Smith met his death at the hands of the defendant during the course of that robbery. Section 189 of the Penal Code provides that "All murder which is perpetrated by means of poison, or lying in wait, * * * or by any other kind of willful, deliberate, and premeditated killing, *or which is committed in the perpetration or attempt to perpetrate * * * robbery * * * is murder of the first degree * * *.*" Emphasis added. People v. Hill, 22 Cal.2d 863, 865, 141 P.2d 418; People v. Bautista, 22 Cal.2d 867, 141 P.2d 417; People v. Vaiz, 55 Cal.App.2d 714, 131 P.2d 407.

Defendant argues that the (chief deputy district attorney) district attorney was guilty of prejudicial misconduct in two instances, both of which occurred during his closing argument to the jury.

The first instance is as follows: "Now, it is interesting to note that in going over these steps (the procedure after the death penalty has been imposed by the jury) that Counsel omitted one very, very important step. He said the responsibility (for the imposition of the death penalty) was entirely yours. There was nothing the Court could do. Nothing we could do. It was entirely your responsibility. Nothing they could do in San Quentin, or wherever it happens to be. Well, it so happens, Ladies, that the State of California has what is known as an automatic appeal in a death case, and *it is not entirely your responsibility. Your verdict must be approved in a death case by the Supreme Court of the State of California before all of the steps* *that he mentioned are taken*, to be sure that the Supreme Court is in agreement with your verdict. *So it is not all your responsibility.* It is part of the Supreme Court of the State of California's responsibility. That step was omitted by Counsel in his attempt to appeal to your sympathy. So that you are not assuming the entire responsibility at all. But if you are convinced, that I am sure you will be and are, that he is guilty of first degree murder in this case, and there should be no recommendation, in such event the Supreme Court will pass upon that. Then it will be their responsibility, after you have passed on the facts and the evidence in this case. (The second assignment of misconduct is the statement following:) And in this argument against the extreme penalty the inference is that the other alternative should be used. Now, a lot of people are under the mistaken notion that life imprisonment means the rest of their natural life, in California. That is not true. The *average life sentence in the State of California is a little under seven years.* That is what it means. That is the punishment he is asking, for the life of Mr. Smith and others. Less than seven years. Not for natural life at all. * * *" (There was no objection.)

It appears necessary to quote the following excerpts from the defense attorney's argument to the jury: "Ladies, you have been asked and you have assumed one of the most difficult responsibilities that any human being can be asked to assume. In the hands of each one of you rests the life of Lloyd Sampsell. A verdict of first degree death penalty can be returned only by unanimous consent. Any one of you jurors can stop that verdict. So each one of you will be individually responsible if that verdict be returned. * * * Now, as I say each of you ladies will be individually responsible for the death of Lloyd Sampsell, if you should return such a verdict. You can't share that responsibility with your other fellow jurors because you, any one of you, could have stopped it and you failed to stop it. So you, the individual who failed to stop it, have complete responsibility. (At this point, the attorney gave a complete and graphic description of the procedure up to and including the scene in the death chamber). * * * In some states it has been the custom, when the judge imposes sentence, the extreme penalty, the death penalty, on a defendant, to add to that, 'And may God have mercy upon your soul.' Wouldn't it have been much better if we could breathe that breath for the juror who returned that verdict—'May God have mercy on your soul?'" (An objection to this line of argument was overruled.)

[2] The defendant maintains that the conduct of the district attorney might have been cured by a specific instruction to that effect by the court, but that no such instruction was given. (No such instruction was requested.) He contends that the statement made by the district attorney as to the effect of the automatic appeal to this court misled the jury to his prejudice and may have been responsible for the imposition by it of the death penalty. He cites cases to the effect that this court has no right to review the exercise of the jury's reasonable discretion in capital cases. To that effect, when there is evidence to sustain the jury's finding, see: People v. Adams, 199 Cal. 361, 249 P. 186; People v. Hill, 22 Cal.2d 863, 141 P.2d 418; People v. Bautista, 22 Cal.2d 867, 141 P.2d 417; People v. Berryman, 6 Cal.2d 331, 57 P.2d 136; People v. French, 12 Cal.2d 720, 87 P.2d 1014. The defendant, however, made no attempt to object to these remarks during the course of the trial, nor was the court requested to admonish the jury concerning them. It would appear that such an objection and request should have been made (People v. Codina, 30 Cal.2d 356, 362, 181 P.2d 881; People v. Chilcott, 18 Cal.App.2d 583, 64 P.2d 450), since it does not appear that the case falls within one exception to the general rule as set forth in People v. Podwys, 6 Cal.App.2d 71, 76, 44 P.2d 377. That exception is this: Where an examination of the entire record fairly shows that the acts complained of are of such a character as to have produced an effect which, as a reasonable probability, could not have been obviated by any instructions to the jury, then the absence of such assignment and request will not pre-

clude the defendant from raising the point. See, also, People v. Stafford, 108 Cal.App. 26, 290 P. 920; People v. Simon, 80 Cal. App. 675, 252 P. 758. Nor does the case fall within another exception as stated in People v. Berryman, 6 Cal.2d 331, 337, 57 P.2d 136, 139: "* * * where the case is closely balanced and there is grave doubt of defendant's guilt, and the acts of misconduct are such as to contribute materially to the verdict, a miscarriage of justice results requiring a reversal. People v. Fleming, 166 Cal. 357, 381, 136 P. 291, Ann.Cas. 1915B, 881."

[3, 4] It is also contended that the statement that a life term in California is "less than seven years" is a misstatement of fact and of law, and "vital error" curable only by a specific instruction which was not given. (No such instruction was requested.) Section 3046 of the Penal Code provides that "No prisoner imprisoned under a life sentence may be paroled until he has served at least seven calendar years." The district attorney's remark would seem to be a misstatement of the law since a "life-termer" is not entitled to credits for good behaviour. Whether error of this character is so prejudicial as to constitute reversible error, Const., Art. VI, sec. 4½, must, in the last analysis, depend upon the particular facts of the individual case. People v. Weatherford, 27 Cal.2d 401, 418, 164 P.2d 753; People v. Podwys, 6 Cal.App. 2d 71, 74, 44 P.2d 377. Such a remark was held not to constitute reversible error in People v. La Verne, 212 Cal. 29, 297 P. 561, even though the trial court refused to admonish the jury to disregard the remarks. In People v. Caetano, 29 Cal.2d 616, 619, 177 P.2d 1, the judge had admonished the jury to disregard any remarks made by the prosecuting attorney about parole, and this court said that the argument was not proper, but that it did not constitute reversible error. In the instant case, when the argument made by defense counsel is taken into consideration, it would appear that the prosecution did not commit such prejudicial error as to warrant a reversal. The court admonished the jury generally during the defense attorney's argument that they were to disregard any statements of counsel other than "what you have heard from the witness stand."

[5] The district attorney's remarks concerning the function of this Court where an automatic appeal is taken and his remarks concerning the probability of parole constitute reprehensible conduct which is not to be condoned. It is *only* because the evidence in this case so clearly establishes the defendant's guilt that we do not consider that reversible error was committed. We are not unmindful of the fact that the remarks made by the district attorney may have been in response to those made by counsel for the defendant, but we can see no justification for such an argument in the light of the settled rule respecting the function of this Court and the provisions of Section 3046 of the Penal Code.

[6, 7] With respect to the instructions, defendant contends that he has been prejudiced because of the instructions as a whole. He insists that the court instructed the jury as to the specific intent necessary for each of the three crimes with which he was charged, and then instructed that when a murder was committed in the course of a robbery, it was murder in the first degree despite the fact that the killing might have been accidental or unintentional and that from this, and the fact that he had admitted his intent to rob the Seaboard Finance Company, the jury could conclude that the intent necessary for Count Two (assault with intent to commit murder) was proved so as to influence its verdict as to penalty. It is in this connection that defendant contends that the evidence does not support the verdict finding him guilty of assault with intent to murder Harley Cook in that the necessary element of intent was not proved beyond a reasonable doubt.

The record shows that the evidence was more than ample to support the findings of the jury that defendant was guilty of murder in the first degree and of robbery in the first degree. A reading of the instructions as a whole, in conjunction with the testimony adduced upon the trial of the case, compels the belief that the defendant was accorded a fair and impartial trial. In view of the evidence it would appear unnecessary to discuss defendant's contentions with regard to Count Two (assault with intent to commit murder). A review of the entire record convinces us that the judgment should be affirmed, and it is so ordered.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, JJ., and PEEK, J., Pro. Tem., concur.

Rehearing denied; SPENCE, J., dissenting.

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34 Cal.2d 766

COMMERCIAL CREDIT CORPORATION v. ORANGE COUNTY MACHINE WORKS et al.

L. A. 20911.

Supreme Court of California, in Bank.
Feb. 24, 1950.

Rehearing Denied March 23, 1950.

The Commercial Credit Corporation brought action on a note against Orange County Machine Works and others, wherein the named defendant filed a cross-complaint.

A judgment in favor of the named defendant was entered by the Superior Court, Los Angeles County, Harold B. Landreth, J., and the plaintiff appealed.

The Supreme Court, Edmonds, J., held that upon showing that plaintiff actively participated in transaction for purchase by named defendant of mechanical press from its inception, counseling and aiding future vendor-payee, plaintiff could not be regarded as a "holder in due course" of negotiable note given by named defendant in the transaction, and defense of failure of consideration could be maintained upon showing that named defendant did not obtain the press for which it had bargained.

Judgment affirmed.

Prior opinion, 208 P.2d 780.

1. Bills and notes 🔑168

Fact that purported negotiable note and conditional sales contract were executed concurrently would not alone defeat negotiability of note. Civ.Code, § 3133.

2. Bills and notes 🔑168

In absence of fraudulent misrepresentation, physical attachment of a purported negotiable note and conditional sales contract at time of execution did not render the note non-negotiable where contract clearly showed facts in regard to it. Civ.Code, § 3133.

3. Bills and notes 🔑343, 346

Where finance company actively participated in transaction for purchase of mechanical press from its inception, counseling and aiding future vendor-payee, finance company could not be regarded as a "holder in due course" of negotiable note given in the transaction by buyer, and defense of failure of consideration could properly be maintained by buyer upon showing that it did not obtain the press for which it bargained. Civ.Code, § 3133.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Holder in Due Course".

Wm. G. Junge and Robert J. McGowan, Los Angeles, for appellant.

Wm. K. Lindsay, Los Angeles, for respondents.

EDMONDS, Justice.

Commercial Credit Corporation sued Orange County Machine Works, the maker of a promissory note representing the amount unpaid upon a conditional sales contract. The appeal from a judgment in favor of the maker presents for decision questions concerning the negotiability of the instrument and the respective rights of the parties in connection with the defense of failure of consideration.

The Machine Works was in the market for a Ferracute press. Ermac Company knew of one which could be purchased from General American Precooling Corporation for $5,000 and offered to sell it to the Machine Works for $5,500. Commercial Credit was consulted by Ermac and asked to finance the transaction. It agreed to do so by taking an assignment of the contract of sale between Ermac and the Machine Works.

During a period of about eight months before this time, Ermac had obtained similar financing from Commercial Credit and had some blank forms supplied to it by the latter. By a contract written upon one of these forms, which was entitled "Industrial Conditional Sales Contract", Ermac agreed to sell and Machine Works bound itself to purchase the press.

The terms of the contract relating to deferred payments were stated as follows: "The balance shown to be due hereunder (evidenced by my note of even date to your order) is payable in 12 equal consecutive installments of $355.09 each, the first installment payable one month from date hereof. Said note is a negotiable instrument, separate and apart from this contract, even though at the time of execution it may be temporarily attached hereto by perforation or otherwise." The agreement also provided: "This contract may be assigned and/or said note may be negotiated without notice to me and when assigned and/or negotiated shall be free from any defense, counterclaim or cross complaint by me."

The note sued upon was originally the latter part of this printed form of contract but at a dotted or perforated line could be detached from it. At the time the president of Machine Works signed the contract and note, he raised a question about that portion of the document below the line. He was told it was just "a part of the contract".

Machine Works paid $1,512.50 to Ermac. That company, pursuant to the arrangements which it had made with Commercial Credit, assigned the contract and endorsed the note to the latter, which gave Ermac its check for $4,261. At the time the contract was delivered to the finance company the note had not been detached. Ermac deposited in its bank that check and the one received from the Machine Works, and sent to Precooling Corporation its check for $5,000. Upon presentation, this check was dishonored and because it was not paid, Precooling Corporation did not deliver the press.

By the present action, Commercial Credit is endeavoring to obtain a judgment against Machine Works and Ermac for the amount paid to Ermac, together with incidental fees and interest. Ermac defaulted. By cross-complaint, Machine Works demands $1,512.50 from Ermac and also seeks declaratory relief against Commercial Credit. Upon these pleadings and the evidence stated, which in all essential respects is uncontradicted, judgment was rendered in favor of Commercial Credit and Machine Works against Ermac, but in favor of Machine Works insofar as the demands of Commercial Credit against it are concerned. The Court found that at the time Commercial Credit paid $4,261 to Ermac it knew that the mechanical press did not belong to that company, and had not been delivered to Machine Works. As a conclusion of law, the court determined that Commercial Credit is not a holder in due course of the note.

As grounds for a reversal of the judgment in favor of Machine Works, the finance company insists that the note, in form, is negotiable, and its status, as such, was not changed because of original physical attachment to, nor later detachment from, the sales contract. A note, otherwise negotiable, does not lose that status, says the appellant because it was given in connection with a conditional sales contract. Another point urged is that the character of an otherwise negotiable note is not destroyed by reason of the simultaneous assignment of a conditional sales contract, for security, to the endorsee of the note. Finally, the appellant argues, the note here sued upon is a separate and distinct instrument, negotiable in form; Machine Works knew its purpose and legal effect and is estopped to assert failure of consideration as a defense to an action upon it.

Machine Works directly challenges these contentions and asserts that Commercial Credit did not acquire the instrument in good faith and for value, and had notice of infirmities in the instrument and of the defect in the title of Ermac. As to the form of the instrument, the respondent takes the position that the conditional sales contract and the attached note must be construed as constituting a single document. As so construed it is a sales contract, assignable but not negotiable, and subject to all equities and defenses which the original parties to the contract may have had. Moreover, Machine Works asserts that the finance company was a party to the original transaction rather than a subsequent purchaser; it took title subject to all equities or defenses existing in its favor against Ermac, and any negotiability of the note was destroyed when it and the conditional sales contract were transferred together as one instrument.

Under section 3133 of the Civil Code, a holder in due course is one who has taken the instrument under the following conditions:

"(1) That it is complete and regular upon its face;

"(2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

"(3) That he took it in good faith and for value;

"(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

[1, 2] In some states, it has been held that in a suit upon a note executed concurrently with a conditional sales contract, a personal defense to the contract may be interposed, Von Nordheim v. Cornelius, 129 Neb. 719, 262 N.W. 832; Federal Credit Bureau, Inc., v. Dining Car Corporation, 238 App.Div. 379, 264 N.Y.S. 723; Todd v. State Bank, 182 Iowa 276, 165 N.W. 593, 3 A.L.R. 971; State National Bank of El Paso, Tex. v. Cantrell, 47 N.M. 389, 143 P.2d 592, 152 A.L.R. 1216. Authorities in other jurisdictions are to the contrary, Thal v. Credit Alliance Corp., 64 App.D.C. 328, 78 F.2d 212, 100 A.L.R. 1354, containing a review of the cases; Commercial Credit Co. v. McDonough Co., 238 Mass. 73, 130 N.E. 179; Northwestern Finance Co. v. Crouch, 258 Mich. 411, 242 N.W. 771; B.A.C. Corporation v. Cirucci, 131 N.J.L. 93, 35 A.2d 36; Motor Finance Corporation v. Huntsberger, 116 Ohio St. 317, 156 N.E. 111; Shawano Finance Corporation v. Julius, 214 Wis. 637, 254 N.W. 355. The latter view is more in keeping with the necessities of business, and also better serves the underlying spirit of the Negotiable Instruments Act. There is no good reason why the concurrent execution of a note and a conditional sales contract should deprive an otherwise negotiable instrument of the characteristics which give it commercial value. That factor alone should not defeat negotiability. Nor, in the absence of fraudulent misrepresentation, not here present, is there reason to hold that the physical attachment of a note and a conditional sales contract at the time of execution renders the note non-negotiable where the contract clearly shows the facts in regard to it.

In Commercial Credit Co. v. Childs, 1940, 199 Ark. 1073, 137 S.W.2d 260, 261, 128 A.L.R. 726, the court said:

"* * * The note and contract are attached and constitute one instrument covering an agreement of the sale and purchase of the automobile in question. * * The note, contract and assignment were all executed and signed the same day. The instrument was prepared and delivered to the Arkansas Motors, Inc., by appellant to be used by it in the sale and purchase of cars. Appellant financed the deal.

"We think appellant was so closely connected with the entire transaction or with the deal that it cannot be heard to say that it, in good faith, was an innocent purchaser of the instrument for value before maturity. * * * Rather than being a purchaser of the instrument after its execution it was to all intents and purposes a party to the agreement and instrument from the beginning. * * *"

The case is commented upon in 53 Harvard Law Review, page 1200, as follows: "By abandoning the test of the 'white heart and the empty head' in the case of a transferee who is more like a party to the original transaction than a subsequent purchaser, the decision increases the protection afforded the consumer who has not received what he was promised. * * * The holding is desirable in that it shifts the risk of the dealer's involvency to the party better able to bear it, and since holders in due course from the finance company will be protected, the decision does not clog negotiability."

In the present case, Commercial Credit supplied Ermac with forms and was twice consulted by telephone as to the impending deal. It knew all of the details of the transaction. Indeed, financing was applied for because Ermac did not have the money to buy the machinery which Machine Works desired to obtain. Throughout the entire transaction, Commercial Credit dealt chiefly with Ermac, the future payee, rather than with Machine Works, the future maker. Commercial Credit advanced money to Ermac with the understanding that the agreement and note would be assigned or endorsed to it immediately. In a very real sense, the finance company was a moving force in the transaction from its very inception, and acted as a party to it. Moreover, Commercial Credit knew the financial status of Ermac. As stated in the appellant's brief, Ermac was "* * * one of innumerable independent sellers of merchandise on conditional sales whose credit had been checked and financial integrity demonstrated."

[3] When a finance company actively participates in a transaction of this type from its inception, counseling and aiding the future vendor-payee, it cannot be regarded as a holder in due course of the note given in the transaction and the defense of failure of consideration may properly be maintained. Machine Works never obtained the press for which it bargained and, as against Commercial, there is no more obligation upon it to pay the note than there is to pay the installments specified in the contract.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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96 Cal.App.2d 183

SANDHU v. MAIN et al.

Civ. 7735.

District Court of Appeal, Third District, California.

Feb. 21, 1950.

Action by Sohan Sandhu against W. Main, Henry R. Sam, Seaboard Finance Company, a corporation, and Bank of America National Trust & Savings Association, a corporation, for damages for value of a tractor, and loss of its use.

The Superior Court, Madera County, Stanley Murray, J., entered judgment for plaintiff, and defendant Seaboard Finance Company, a corporation, appealed.

The District Court of Appeal, Sparks, J., pro tem, held that where tractor was removed from county in which chattel mortgage on it was recorded, and remained out of county for three months prior to its sale, and mortgagee neither caused its mortgage to be recorded in other county nor took possession of tractor, innocent purchaser in good faith for value during period of exemption, and without notice of mortgage acquired title free of encumbrance.

Judgment affirmed.

1. Chattel mortgages ⚷89

Where mortgagee of tractor failed to record its mortgage in second county where buyer from mortgagor took tractor, or to take possession of tractor during three-month period tractor remained in second county innocent purchaser in good faith and for value, during period tractor was in second county, and without notice either actual or constructive of mortgage recorded in county where tractor was originally sold, acquired title free and clear of encumbrance. Civ.Code, § 2965.

2. Chattel mortgages ⚷3

The authority for creation of chattel mortgages derives its force from statutory provisions relating to the subject, and it is necessary to comply with requirements of statute and strictly to observe its provisions in order to protect rights accruing under such mortgages. Civ.Code, § 2965.

3. Chattel mortgages ⚷152, 194

The recordation of a chattel mortgage is one of necessary requisites to protect rights of mortgagee against creditors of mortgagor and subsequent purchasers and encumbrancers of property in good faith and for value. Civ.Code, § 2965.

4. Chattel mortgages ⚷1

The policy of the law is against secret liens and charges to injury of innocent purchasers or encumbrancers for value, and mortgages of personalty are permitted only in specified cases, and then only upon observance of certain formalities designed to insure good faith and to give notice to world of good character of transaction. Civ.Code, § 2965.

5. Chattel mortgages ⚷89, 292(1)

Where mortgagee failed to record chattel mortgage in county to which mortgaged personalty was removed, and personalty was sold to intervening bona fide purchaser for value without actual notice of mortgage, mortgagee lost its lien, and purchaser was entitled to damages for unlawful taking of personalty by mortgagee under color of foreclosure proceedings, and for loss of use of personalty. Civ.Code, § 2965.

◆

Bromley, Ritter & Lindersmith, Los Angeles, and Ralph Robinson, Fresno, for appellants.

Coffee & Wolfe, Madera, for respondent.

SPARKS, Justice pro tem.

Defendant Seaboard Finance Company, a corporation, has appealed from a judgment awarding plaintiff, Sohan Sandhu, damages in the sum of $1,400 for the value of an International tractor, and $240 for the loss of its use.

There is no material controversy as to the facts. They disclose that in November, 1946, the tractor in question was owned by one W. Main and situate in San Joaquin County. In that month Main executed a chattel mortgage on the vehicle to defendant Seaboard Finance Company for $2,000. This mortgage was recorded in San Joaquin County on November 22, 1946. Thereafter Main sold the tractor to Henry R. Sam, his stepson, for $1,700, and not only failed to apprise Sam of the mortgage but instead assured him that there were no encumbrances on it. On or about July 7, 1947, Sam removed the tractor from San Joaquin to Madera County and kept it there continuously until he sold it on September 10, 1947, to plaintiff Sandhu. Sandhu paid Sam $1,400 for the vehicle and had no knowledge of the mortgage of the Seaboard Finance Company or of any other defect of title. Appellant's chattel mortgage had not been recorded in Madera County or in any county other than San Joaquin. Meanwhile, W. Main defaulted on his payments to Seaboard Finance Company and departed, leaving no forwarding address. The amount due and owing on the chattel mortgage was $1,831.91. Seaboard Finance Company instituted a search for the vehicle, located it sometime in the month of June or July in 1948 in Madera County and took it from the possession of plaintiff. It was subsequently sold by appellant and passed into the hands of persons outside the jurisdiction of the trial court.

It is appellant's contention that respondent Sandhu acquired no better title to the tractor than that held by the party from whom he had purchased, namely, Henry Sam. The latter, of course, purchased the property in San Joaquin County, where appellant's chattel mortgage was on record, and of which Sam had constructive notice. It is urged then that since the sale from Main to Sam was without the knowledge or consent of appellant and subject to its mortgage, that when Sam took the tractor to Madera County and claimed to be the owner thereof, he committed a conversion.

Respondent, on the other hand, maintains that appellant had lost its lien upon the tractor prior to the time it was repossessed, and that Sandhu as a bona fide purchaser for value without notice had acquired an unencumbered title and that consequently appellant was liable in damages for the unlawful taking of the vehicle.

The effect upon a chattel mortgage lien of removing the mortgaged property from the county in which it is situate to another county has in this State been defined by legislative enactment. Section 2965 of the Civil Code provides as follows:

"When personal property mortgaged (other than animate personal property mortgaged by a resident of this state, and motor vehicles and other vehicles defined in and the mortgaging of which are regulated by the California Vehicle Act), is removed from the county in which it is situated, the lien of the mortgage shall not be affected thereby for thirty days, after such removal; but, after the expiration of such thirty days, said property mortgaged, is exempted from the operation of the mortgage, except as between the parties thereto, until either:

"1. The mortgagee causes the mortgage to be recorded in the county to which the property has been removed; or

"2. The mortgagee takes possession of the property as prescribed in the next section."

By virtue of this section the mortgage lien continues for only a period of thirty days. Thereafter the property is exempted from the lien unless the mortgagor either causes the mortgage to be recorded in the county to which the property has been removed, or takes possession of the property and sells it as a pledge.

[1] Here the undisputed facts show that the tractor was removed to Madera County in July, 1947, and remained there for a period of three months prior to its sale to respondent. During this period of time appellant neither caused its mortgage to be recorded in Madera County nor took possession of the vehicle. Respondent being an innocent purchaser in good faith and for value during this period of exemption, and without notice either actual or constructive of appellant's mortgage, acquired title free and clear of encumbrance. Hopper v. Keys, 152 Cal. 488, 92 P. 1017; Kahriman v. Fitzgerald, 85 Cal.App. 180, 259 P. 90.

The cases of Hammels v. Sentous, 151 Cal. 520, 91 P. 327, 12 Ann.Cas. 945, and Pacific Fruit Exchange v. F. E. Booth Co., 103 Cal.App. 54, 283 P. 944, relied upon by appellant, can be distinguished from the facts here for the reason that in both cases the sales of the mortgaged property after being removed to another county took place *during* and not after the expiration of the thirty-day period, and consequently were properly held to be subject to the mortgage lien. There is a further distinction in that in both of these cases there was an actual conversion of the mortgaged property in the sense that it was changed from its original form to that of another. In Hammels v. Sentous, hogs were slaughtered and converted into meat, and in Pacific Fruit Exchange v. F. E. Booth Co. pears were picked from the trees and canned.

The fact that the mortgagor named did not himself remove the property from San Joaquin County, but instead sold it to Sam who effected the removal would in no wise alter the application of Section 2965 of the Civil Code. Admittedly, the mortgage lien was not divested from the property by such sale, and remained attached to the vehicle when it was removed to Madera County and continued so attached until thirty days thereafter.

[2-4] As pointed out in the case of Hopper v. Keys, supra, the authority for the creation of chattel mortgages in this state derives its force from the statutory provisions relating to the subject. It is necessary to comply with the requirements of the statute and strictly to observe its provisions in order to protect and preserve the rights accruing under such mortgages. In this connection the court said, 152 Cal. on page 493, 92 P. on page 1020:

"* * * That the recordation of the mortgage, under our present system, is one of the necessary and indispensable requisites to protect the rights of the mortgagee against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, is a self-evident proposition. 'It must be remembered, in general, that the policy of the law is against secret liens and charges to the injury of innocent purchasers or incumbrancers for value, and in particular that mortgages of personal property are permitted only in certain specified cases, and then only upon the observance of certain formalities, designed to insure good faith, and to *give notice to the world* of the character of the transaction.' Palmer v.

Howard, 72 Cal. 293, 13 P. 858, 1 Am.St. Rep. 60 [and note]. What 'notice to the world' is must be and is committed to the legislative judgment."

[5] The California Legislature has thus seen fit to declare that the recordation of a chattel mortgage in the first instance is not sufficient to keep the lien alive for longer than thirty days if the mortgaged property be subsequently removed from the county where it was situate. Thereafter the mortgagee may proceed in alternate ways as set forth in the statute in order to protect his rights under the mortgage. When he fails to do so it must be held that an intervening bona fide purchaser for value and without actual notice of the mortgage, as in this case, acquires a title free and clear of the mortgage lien.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

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96 Cal.App.2d 107

BUNKER v. SUPERIOR COURT, IN AND FOR LOS ANGELES COUNTY.

Civ. 17363.

District Court of Appeal, Second District, Division 3, California.

Feb. 17, 1950.

Rehearing Denied March 6, 1950.

Hearing Denied April 17, 1950.

Prohibition proceeding by Frank S. Bunker against the Superior Court of the State of California in and for the County of Los Angeles to restrain a prosecution under an indictment charging petitioner and three others with abortion and murder.

The District Court of Appeal, Shinn, P. J., held that the evidence was insufficient to justify the indictment against petitioner.

Petition granted.

Wood, J., dissented.

1. Abortion 🔑3

Mere ownership of building wherein abortion allegedly took place, and consent of owner to use of office facilities were not indicative of guilty knowledge on part of doctor owning building in absence of any evidence that owner participated in or had any knowledge of contemplated abortion.

2. Abortion 🔑8

Mere possession of surgical instruments useful for commission of an abortion conveys no permissible inference of guilt. Pen.Code, § 274.

3. Indictment and information 🔑10

Where evidence showed only that accused physician allowed another to use his offices, equipment and nurse on weekends, but accused shared no fees and was unaware of practices of the other, and decedent signed written statement releasing accused of liability before she went to hospital and died from abortion allegedly performed by second doctor, grand jury were not justified in charging accused with abortion and murder. Pen.Code, §§ 274, 921, 995.

4. Prohibition 🔑5(4)

Where evidence before Grand Jury furnished no reasonable basis for indictment, court was without jurisdiction to proceed to trial, and would be restrained by writ of prohibition. Pen.Code, §§ 921, 995.

Henry E. Kappler, Walter N. Anderson, Los Angeles, for petitioner.

W. E. Simpson, District Attorney, Robert Wheeler, Deputy District Attorney, Los Angeles, for respondent.

SHINN, Presiding Justice.

Petitioner seeks by Writ of Prohibition to prevent his prosecution under an indictment charging him and three others with the offenses of abortion and murder. The decedent will be referred to as Miss B. The trial court denied defendants' motion under 995 Penal Code to quash the indictment for lack of any evidence to support it. The same ground of attack is urged in the present proceeding. We are convinced that it has merit.

The transcript of the testimony given before the Grand Jury contains evidence of the following facts: Miss B was an unmarried seventeen year old high school student. For some time prior to May 17, 1949, her health had not been normal. On that day, she was examined by a gynecologist and found to be four and a half or five months pregnant. On May 20th, her parents took her to the offices of Dr. William Eisoff, who arranged by telephone for an abortion to be performed. He stated that he would call them later in the day to give them the time and place for the operation. About 6 o'clock in the evening, the parents received a phone call from some one they believed to be Dr. Eisoff, telling them to take their daughter to 4230 South Figueroa Street in Los Angeles at 7:30 the following morning, that the price would be $500, and that they were to ask for Mary and say they were Dr. Arons' patients. On the morning of May 21, 1949, the three went to the appointed address, which was the medical offices of petitioner Dr. Frank S. Bunker. They were there met by Dr. Leonard Arons and Mary Jensen, a nurse employed by Dr. Bunker. Dr. Arons examined the girl and instructed Mary Jensen to feel her stomach. He said, "Oh, nothing to it. That's just liquid." Then, taking the parents into another room, in private conversation, Dr. Arons said they would "pack" the patient, and that there was nothing to it. The father paid Arons $500 in cash. The parents then went home, after Dr. Arons promised to call them about 11:00 a. m., leaving their daughter in the care of Dr. Arons. At 9:45 a. m., Dr. Theodore Bluechel, an experienced surgeon, received a phone call from Mary Jensen, who told him that Dr. Arons, who was working in Dr. Bunker's office, had a surgical case of acute appendicitis, and wanted Dr. Bluechel to operate at once, at the South Hoover Hospital. At 10:00 a. m., the parents received a phone call from Mary, informing them that "the doctor decided we needed surgery," and that their daughter was going to be transferred to the South Hoover Hospital "as an acute appendectomy." The parents returned to Dr. Bunker's office, where they signed a consent to surgery and a statement releasing Dr. Bunker from liability. Miss B was removed to the hospital in an ambulance. She was delirious and moaning at the time. Dr. Bluechel arrived at the hospital at 11:00 a. m. He met Dr. Arons, who told him the patient had acute appendicitis, possibly a ruptured appendix, and that he, Dr. Arons, had just examined her at Dr. Bunker's office that morning. Dr. Bluechel operated at once, in the presence of Dr. Arons. It was discovered that an abortion had been attempted and that severe internal injuries had been incurred by the patient. Dr. Bluechel asked Dr. Arons if he knew anything about it, and "he said that an abortion had been attempted." Dr. Bluechel repaired the damage so far as possible, but, as a result of peritonitis due to her injuries, Miss B died on May 27th. There was medical testimony that an abortion was not necessary to save her life.

The only evidence relating in any degree to Dr. Bunker consists of the following: He owned the offices at 4230 South Figueroa; he had known Dr. Arons for about a year and had an arrangement with him for the latter to come to Dr. Bunker's office over weekends to take care of the patients of both doctors; on the morning of May 21st Dr. Bunker was studying for an examination in an apartment upstairs from the office; he stated to the arresting officer that "about 9:15 A.M. he received a call that there was a mutilation case in the office and that he had gone down there to see what it was all about; when he got to the office he looked in and saw this girl and said that she should be taken to the hospital immediately"; on June 2nd, when Dr. Bunker was arrested, certain surgical instruments which would be useful in the performance of an abortion were found in his office; in addition some nine drawers were found to be missing from a filing cabinet which ordinarily would have held twelve or fourteen drawers; Dr. Bunker stated to the officer that he did not know what had become of the missing drawers but that "maybe the bookkeeper took them to get out the statements." Miss B's mother testified that at the request of the nurse, Mary Jensen, she had signed an instrument releasing Dr. Bunker from liability when it was found necessary to transfer her daughter to the hospital. It appears also from the testimony of the arresting officer that when asked certain questions at the time of his arrest Dr. Bunker said he would rather not answer without the advice of an attorney.

The foregoing is the only evidence before the Grand Jury which tended in any degree to connect petitioner with the offenses. There was other evidence, which was uncontradicted, that Dr. Bunker was not present when Miss B and her parents arrived at the office; that at no time did the parents see or have any dealings whatsoever with Dr. Bunker; that he was not present during Dr. Bluechel's operation, and never visited Miss B or gave her any medical care while she was in the hospital. Moreover, according to the father's testimony, he, and it may be inferred his wife also, did not even know that the offices at 4230 South Figueroa were Dr. Bunker's until after the operation had taken place.

[1-3] The transcript discloses no evidence whatsoever which connects Dr. Bunker with the commission of the offenses for which he was indicted. Mere ownership of the building wherein the abortion allegedly took place, and consent to the use of office facilities by Dr. Arons are not indicative of guilty knowledge in view of the complete absence of any evidence that Dr. Bunker participated in, or had any knowledge of the contemplated abortion. See Dong Haw v. Superior Court, 81 Cal.App.2d 153, 158, 183 P.2d 724. Considering the nature of the arrangement between Dr. Arons and Dr. Bunker for the former to have the use of the latter's well-equipped office on weekends, we think no special significance, so far as Dr. Bunker is concerned, may be attached to the early hour of the appointment, nor to the fact that Dr. Bunker's nurse remained on duty while Dr. Arons was using the office. There is not a shred of evidence tending to show that the surgical instruments found in Dr. Bunker's office some eleven days later were used in the commission of the abortion or were intended to be so used. It is manifest that mere possession of instruments useful for that purpose conveys no permissible inference of guilt. It appears from Dr. Bluechel's testimony that the instruments were such as are customarily employed in the practice of gynecology. Moreover, a miscarriage may be legally procured in certain cases. Penal Code, sec. 274; People v. Murphy, 60 Cal.App.2d 762, 771, 141 P.2d 755. Neither the execution of the release of Dr. Bunker from liability at the request of the nurse, nor the absence of the filing drawers, does more than create the vaguest sort of suspicion; and they have no legitimate tendency to implicate Dr. Bunker in the offense charged. The former, so far as the evidence shows, was evidently a mere routine step taken by Dr. Bunker's nurse in view of his order that the patient be sent to the hospital at once; and there is nothing to render improbable Dr. Bunker's explanation of the missing records. Likewise, no inculpating inference may be derived from Dr. Bunker's refusal to answer, without the advice of any attorney, certain questions asked by the arresting officer. These queries related chiefly to statements and conduct of Dr. Arons, and none of them was in any way accusatory of Dr. Bunker, so as to call for a denial. These circumstances, like all of the others in evidence relating to Dr. Bunker, are fully consistent with innocence, and do not, by any logical process, provide a basis for an inference of guilt. The record is devoid of even a scintilla of evidence that Dr. Bunker knew of Miss B's pregnancy, or that she was in his office, until after the attempted abortion took place. There is no testimony whatsoever tending to show that Dr. Bunker was aware of what Dr. Arons was doing in his offices, on the occasion in question or at any other time, or that Dr. Bunker shared in the fee paid to Arons. The record as a whole, fairly depicts a rather unusual situation wherein, if the truth of the testimony be assumed, a physician who has been permitted to use a brother physician's facilities for legitimate purposes, has used them il-

legally. Any other inference on the basis of the present record would be entirely unreasonable.

[4] Section 921 of the Penal Code provides that "the grand jury ought to find an indictment when all the evidence before them, taken together, if unexplained or uncontradicted, would, in their judgment, warrant a conviction by a trial jury." In considering the effect of this section, it has been held that a valid indictment cannot be founded upon mere speculation and conjecture, but must have a basis in evidence providing a rational ground for an assumption of the possible guilt of the accused. Where the evidence before the Grand Jury furnishes no reasonable basis for an indictment the court is without jurisdiction to proceed to trial and will be restrained by writ of prohibition. Greenberg v. Superior Court, 19 Cal.2d 319, 121 P.2d 713.

Let the peremptory writ issue.

VALLÉE, J., concurs.

WOOD, J., dissents.

Rehearing denied; WOOD, J., dissenting.

Hearing denied; SHENK, EDMONDS, and SPENCE, JJ., dissenting.

96 Cal.App.2d 112

JENSEN v. SUPERIOR COURT, IN AND FOR LOS ANGELES COUNTY.

Civ. 17375.

District Court of Appeal, Second District,
Division 3, California.
Feb. 17, 1950.

Rehearing Denied March 6, 1950.

Hearing Denied April 17, 1950.

Prohibition proceeding by Mary Jensen against the Superior Court, State of California, in and for the County of Los Angeles to restrain a prosecution under an indictment charging petitioner and three others with abortion and murder.

The District Court of Appeal, Shinn, P. J., held that the evidence failed to support the indictment.

Petition granted.

1. Indictment and information 🔑10
Prohibition 🔑28

In a proceeding for writ of prohibition to restrain prosecution under an indictment, courts may not inquire into sufficiency of evidence to support indictment provided there is some evidence to support it; but indictment is void and confers no jurisdiction upon trial court to proceed with trial where there is no evidence to connect accused with crime charged. Pen.Code, § 995.

2. Indictment and information 🔑10

In determining whether there was evidence to support indictment, court would assume that uncorroborated testimony of alleged accomplices would be sufficient to support indictment if it supplied some evidence of guilt although testimony would not by itself justify a conviction. Pen. Code, § 995.

3. Indictment and information 🔑10

Knowledge and ensuing conduct subsequent to alleged offense could not provide a basis for holding accused to answer for offense charged.

4. Criminal law 🔑317

Where accused just prior to arrest was advised by her attorney over the telephone not to speak about case, no legitimate inference of guilty consciousness could be derived from accused's refusal to answer questions of arresting officers.

5. Indictment and information 🔑10

Where evidence is wholly circumstantial and in every aspect is reasonably consistent with innocence, mere fact that circumstances may also be reconciled with guilt will not justify an indictment; and grand jury may not resolve all implications in favor of guilt by substituting a presumption of guilt for one of innocence. Pen.Code, § 995.

6. Indictment and information ⚷10

Where evidence showed that physician allowed another to use his offices, equipment and nurse, but first physician was not a participant in second's alleged performance of an abortion, and there was no evidence that nurse knew of the abortion although she made hospital arrangements and followed instructions of second physician, grand jury was not justified in charging nurse with abortion and murder. Pen.Code, § 995.

7. Criminal law ⚷308

A person has a right to be free from prosecution for a crime unless there is some rational ground for assuming possibility that he is guilty. Pen.Code, § 995.

8. Prohibition ⚷5(4)

Where evidence was insufficient to justify indictment, a grave injustice would be done to petitioner if required to undergo ordeal and expense of trial, and writ of prohibition would issue to restrain prosecution. Pen.Code, § 995.

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Lane & McGinnis, Los Angeles, for petitioner.

William E. Simpson, District Attorney, Jere J. Sullivan, Deputy District Attorney, Los Angeles, for respondent.

SHINN, Presiding Justice.

Petitioner Mary Jensen was named as one of four defendants joined in an indictment charging the abortion and murder of a seventeen year old girl whom we shall refer to as Miss B. She made a motion under section 995, Penal Code, to quash the indictment and the same having been denied, she has applied for prohibition upon the ground that the indictment is void as to her because of the absence of any evidence before the grand jury to connect her with the charged offenses. The salient facts are stated in the companion case of Bunker v. Superior Court, Cal.App., 214 P.2d 825, and are referred to as supplementing the facts to be hereinafter stated.

The evidence before the Grand Jury, insofar as it relates in any manner to petitioner, consists of testimony as to the following facts: Petitioner was a nurse employed by Dr. Frank Bunker at his office at 4230 South Figueroa Street in Los Angeles; Mrs. B, mother of deceased, testified that about 6:00 or 7:00 o'clock in the evening of May 20th, she received a telephone call from some one who did not identify himself, but whom she believed to be Dr. Eisoff, telling her to have her daughter at 4230 South Figueroa at 7:30 the next morning. The caller also stated, "When you get there, say you are Dr. Arons' patient." These instructions were followed. Upon arrival at the stated address, they were met by Mary Jensen and Dr. Leonard Arons. Mary told them to get Miss B undressed, which they did, putting a hospital nightgown on her. Dr. Arons came in and felt the girl's stomach. At his direction, Mary also felt her stomach. As she did so, Dr. Arons said, "Here, feel here. Oh, nothing to it. That's just liquid." The parents were then taken to a separate room where the proposed abortion was discussed, and where the father paid Dr. Arons $500. Mary Jensen was not present when the money was paid, but as they were leaving this room, Dr. Arons asked Mary, "Did you give her a capsule? The parents went home, About 10:00 a. m., Mrs. B received a phone call from Mary: "She said, 'Oh Mrs. [name], I think you better come down.' She said, 'The doctor decided we needed surgery. * * * They're going to take her to the South Hoover Hospital, and doctor is over there now,' she said, 'making arrangements for surgery.' And she said, 'When they take her over there she will go in as an acute appendectomy.' I said, 'Mary, tell me first, is there anything wrong?' She said, 'No, don't worry, just come down.' And she did say that when [name] came out of the ether to tell her that if the nurses asked her anything to say it was appendicitis." The parents went back to Dr. Arons' office. Mary met them, and said "nothing was wrong," but "the doctor decided she better be taken to the hospital." The ambulance came, and Mary said to lay her down flat, for "its an acute appendectomy." The patient was taken away. At Mary's request the parents signed a statement releasing Dr. Bunker from liability in connection with the case. Later, at the hospital, when the girl came out of the ether, she said, "Where is Mary? Mother, Mary is awfully nice." Mr. B, the father, testified that late in the afternoon of May 20th they received a phone call from an unidentified person who stated that an appointment had been arranged for Miss B for 7:30 the next morning "at a clinic at 42nd and Figueroa," and that they were to "ask for Mary" and say that they had "come to see Dr. Arons." They followed these instructions. He did not learn that the address to which they took their daughter was that of Dr. Bunker's offices until after the attempted abortion took place. When Dr. Arons entered the office to speak to them, Mary left the room. Dr. Arons said he would "pack" the patient and it would not be dangerous at all. He then asked for the money, and was paid $500 in cash.

Dr. Bluechel: At about 9:45 a. m., May 21st, he received a phone call from Mary, the nurse at Dr. Bunker's office. Mary "stated that Dr. Arons, who was working in Dr. Bunker's office, had a surgical case, acute appendicitis, and wanted to know if I would operate." She did not mention the name of the patient, nor any treatment that Dr. Arons might have given the patient.

Officer Jokisch: He and his partner arrested Mary on May 30th. As they were admitted to her apartment the phone rang. It was an attorney. Mary spoke to him, and then stated that "she had been advised not to give us a statement or not to talk to us regarding this case." She was hysterical and crying, and, except for giving her name and occupation, refused to answer any questions without the advice of her attorney.

[1, 2] The law is clear that in this type of proceeding the courts may not inquire into the sufficiency of evidence to support an indictment, provided there is some evidence to support it; but an indictment is void, and confers no jurisdiction upon a trial court to proceed with trial, where there is no evidence to connect the accused with the crime charged. Greenberg v. Superior Court, 19 Cal.2d 319, 121 P.2d 713. In determining whether there is such evidence to support the indictment of Mary Jensen, we may assume that the uncorroborated testimony of the parents, who were accomplices, People v. Wilson, 25 Cal.2d 341, 346, 153 P.2d 720; People v. Stone, 89 Cal.App.2d 853, 202 P.2d 333; People v. Powell, 34 Cal.2d 196, 208 P.2d 974, would be sufficient to support the indictment if it supplied some evidence of guilt, although such testimony would not by itself justify a conviction. See Greenberg v. Superior Court, supra, 19 Cal.2d at page 322, 121 P.2d 713, commenting upon In re Kennedy, 144 Cal. 634, 78 P. 34, 67 L.R.A. 406, 103Am.St.Rep. 117, 1 Ann. Cas. 840; Stern v. Superior Court, 78 Cal. App.2d 9, 17, 177 P.2d 308; Abbott v. Superior Court, 78 Cal.App.2d 19, 21, 177 P.2d 317. Our inquiry is thus confined to the sole question whether the testimony heretofore related, including that of the parents, when considered a relation to the record as a whole, discloses a rational basis for an assumption of Mary Jensen's guilt.

It is perhaps trite to observe that the legal, as well as practical, consequences of otherwise identical facts frequently vary as the accompanying context and environment vary. And where the evidence touching the accused is purely circumstantial, as it is here, the weight to be given to each circumstance must be relative to its influence upon the complete picture. These truisms are peculiarly important here in view of the unusual situation which was thrust upon petitioner. Accordingly, in viewing the evidence, it must be constantly remembered that Mary Jensen was *Dr. Bunker's nurse*, and not Dr. Arons' nurse. There is no evidence whatsoever that she was employed by Dr. Arons, that she was paid by him, nor as to the extent of her services for him. So far as appears, her services, such as they were, might have been included in the arrangement between the two physicians.

There was no evidence that she was aware of the nature or details of Dr. Arons' practice, nor evidence as to the nature of the services she was supposed to render him. We have this day held that Dr. Bunker was not shown to have been implicated in the abortion in the slightest degree. There was no evidence that he had any suspicion of illegal practices on the part of Dr. Arons. It must be presumed that his own practices, as well as the services which petitioner was accustomed to render to him, were in all respects lawful and ethical.

With these facts in mind, it becomes exceedingly plain that no evidence was presented to the Grand Jury from which it might be rationally inferred that Mary Jensen was connected with the offense of which she was charged. As Dr. Bunker's nurse, who remained in his offices while Dr. Arons was using them, it would naturally be her duty under the circumstances to meet Dr. Arons' patients, assist them when requested, make telephone calls at the direction of Dr. Arons, and otherwise carry out his instructions. There is no evidence whatsoever that she knew an abortion was to take place, or that she even knew Miss B was pregnant, except insofar as she might have surmised as much from feeling her body. In connection with the latter testimony, however, we think it of the utmost significance that Dr. Arons said, when he directed Mary to place her hands upon the patient's abdomen, "That's just liquid." Since the mother, the only other person present, was fully aware that her daughter was pregnant, and had come to Dr. Arons to alleviate that condition, the only rational explanation of his remark is that it was designed to deceive and allay any suspicions of petitioner. This testimony, together with the evidence that Arons was careful not to discuss the proposed abortion or permit the money to be paid in the presence of petitioner, and the complete lack of any evidence that petitioner assisted Dr. Arons in any manner other than as stated, leads irresistably to the conclusion that Dr. Arons surreptitiously attempted to procure the abortion without the knowledge or assistance of Mary Jensen. Every circumstance in evidence which bears upon the question of petitioner's knowledge of Dr. Arons' unlawful acts tends to prove that he concealed their character from her.

[3] It is only reasonable to assume that Mary's telephone calls to Dr. Bluechel and the parents were made pursuant to Dr. Arons' instructions. It is difficult to imagine that petitioner spoke of the patient's condition otherwise than as specifically directed by Dr. Arons. Since the representations that the patient had acute appendicitis clearly derived from Arons, and were no doubt made to arrange for surgery and hospitalization, their falsity in no way reflects upon petitioner's innocence. We find no evidence in the record tending to prove that petitioner had knowledge of their falsity. In any event, even if it were permissible (which we do not concede to be the case) to infer knowledge that an abortion had been committed from the equivocal statement of petitioner to the mother that the daughter would enter the hospital "as an acute appendectomy," and the request that she caution her "to say it was appendicitis," such knowledge and ensuing conduct was subsequent to the offense, and accordingly could not provide a basis for holding petitioner to answer for the offense charged. People v. Viets, 79 Cal.App. 576, 591, 250 P. 588; People v. King, 30 Cal.App. 2d 185, 196, 85 P.2d 928.

[4] In oral argument, the People placed considerable reliance upon petitioner's refusal to answer questions put to her by the arresting officer. It is argued that an inference of guilt arises from failure to deny accusatory statements. The obvious answer is that none of the questions was in any manner accusatory. In any event, the evidence is clear that just prior to her arrest, in the presence of the arresting officers, petitioner was advised by her attorney over the telephone not to speak about the case. In People v. Simmons, 28 Cal.2d 699, 715, 172 P.2d 18, it was said that advice of counsel is one out of many forms of restraint which may bar a free response to accusatory statements. One

who has been placed under arrest is under no duty to engage in a general discussion of his conduct with the arresting officer. No legitimate inference of guilty consciousness could possibly be derived from petitioner's silence under the circumstances of the present case.

[5] Where the evidence is wholly circumstantial and in every aspect is reasonably consistent with innocence, the mere fact that the circumstances may also be reconciled with guilt will not justify an indictment. The grand jury may not resolve all implications in favor of guilt by substituting a presumption of guilt for one of innocence.

[6] Upon thorough consideration of the record before us, we are compelled to conclude that there is a complete lack of any evidence to support the indictment as to petitioner. The most that can be said for the testimony relied upon by the district attorney is that it may create a suspicion of guilt.

[7,8] Our conclusion has been influenced somewhat by the fact that the grand jury upon the same evidence also returned an indictment against Dr. Bunker. If there had been evidence which justified an indictment of Dr. Bunker we would entertain a different view of the evidence as applied to Mary Jensen who was his employee, and not the employee of Dr. Arons. Our conclusion in the case of Dr. Bunker was that he had no knowledge that Dr. Arons was using his office facilities for illegal purposes. We find no evidence that Dr. Arons did not maintain the same secrecy with respect to Mary Jensen. As we have seen, the only statement he made to her concerning the patient's condition before the operation was calculated to mislead her. It is our opinion that the unwarranted assumption by the Grand Jury that Dr. Bunker was a participant in the illegal acts of Dr. Arons led to the indictment of Mary Jensen and that she would not have been indicted had Dr. Bunker been exonerated. It is possible, of course, to suspect complicity with Dr. Arons upon the part of both Dr. Bunker and petitioner, but the only view of the evidence which appeals to us as reasonable is that both were the victims of circumstances brought about by the machinations of Dr. Arons. There was insufficient evidence to overcome "the right of a person to be free from prosecution for crime unless there is some rational ground for assuming the possibility that he is guilty." Greenberg v. Superior Court, supra, 19 Cal.2d at page 322, 121 P.2d at page 715. We are convinced that it would be a grave injustice to petitioner if she were required to undergo the ordeal, ignominy, and expense of a trial under the circumstances.

It is a proper case for the issuance of a writ of prohibition.

Let the peremptory writ issue.

VALLÉE, J., concurs.

WOOD, Justice.

I concur in the judgment. I do not approve the statements that an indictment against Bunker was not justified.

Hearing denied; SHENK, EDMONDS, and SPENCE, JJ., dissenting.

96 Cal.App.2d 147

WUKALOFF et al. v. MALIBOU LAKE MOUNTAIN CLUB, Limited.

Civ. 17075.

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1950.

Antonia Wukaloff and George Wukaloff sued Malibou Lake Mountain Club, Limited, a corporation, for injuries sustained by plaintiff Antonia Wukaloff when she fell on steps in unlighted corridor which was part of defendant's club building.

The Superior Court of Los Angeles County, Warren Steel, J., rendered a judgment adverse to the defendant and defendant appealed.

The District Court of Appeal, Wilson, J., held that plaintiffs were concessionaires in club building and not tenants, and that club owed plaintiffs duty to exercise ordinary care to keep premises in reasonably safe condition, and that negligence of defendant and contributory negligence of plaintiff Antonia Wukaloff was for jury.

Judgment affirmed.

1. Clubs ⚷11
Landlord and tenant ⚷11

Under contract whereunder plaintiffs were to operate dining room of private club and attend to rental of rooms in club building to members, without lease, and were permitted to occupy a room in club building, and conferring upon plaintiffs no election as to who should be permitted to occupy rooms or to be served with meals, plaintiffs' status was not that of tenants but in nature of concessionaires and club had duty to plaintiffs to exercise ordinary care to keep premises in a reasonably safe condition.

2. Clubs ⚷11

Fact that plans for club building were approved by appropriate county officials, that building complied with State Housing Act, the County Building Code and with sound building practice in county in which building was erected, and that a corridor not within four walls of building was not level and had steps in center, because of natural contours of ground on which building was erected, did not relieve club of duty of exercising ordinary care to provide a safe passage along corridor for concessionaires in building. Health and Safety Code, § 15000 et seq.

3. Clubs ⚷12

In action for injuries sustained by concessionaire in building of private club, when plaintiff was walking along portion of corridor which was unlighted and painted a dark color and which was unfamiliar to plaintiff, and plaintiff fell to lower level of corridor when plaintiff reached steps in corridor, negligence of club was for jury.

4. Negligence ⚷32(1)

The owner of a building owes a duty to an invitee to exercise ordinary care in keeping the premises in a reasonably safe condition so as not to expose invitee unnecessarily to danger.

5. Clubs ⚷12

In action for injuries sustained by concessionaire in private club, when plaintiff was walking along portion of corridor which was unlighted and which was painted a dark color and was unfamiliar to plaintiff, and plaintiff fell to lower level of corridor when plaintiff reached steps in corridor, contributory negligence of plaintiff in failing to grasp handrail was for jury.

6. Clubs ⚷11

Knowledge of manager of private club of existence of a dangerous condition in corridor when corridor was not lighted after dark, would be imputed to club in action against club for injuries.

7. Clubs ⚷12

In action for injuries sustained by concessionaire in corridor of private club, testimony of manager of club that manager had fallen three times where plaintiff fell, was admissible as tending to show cause of injuries, notice to club of unsafe condition, and neglect of club in not correcting defect, and that club might reasonably have anticipated that persons walking along corridor were likely to suffer similar accidents.

◆

Engene S. Ives, Los Angeles, for appellant.

Melvin Simon, A. J. O'Connor, Los Angeles, for respondents.

WILSON, Justice.

Defendant has appealed from a judgment entered upon a verdict in favor of plaintiffs as damages for personal injuries received by plaintiff Antonia Wukaloff upon defendant's premises.

On or about January 10, 1947, plaintiffs and defendant, through the chairman of the latter's house committee, entered into an oral agreement whereby plaintiffs were to operate the dining room and attend to the rental of club rooms to members. The terms of the oral agreement were reduced to writing by the chairman of the house committee. The parties agree that the memorandum, though not signed, embodied the terms of the oral agreement with one exception, to wit, that the officers of the club determined the price of meals and room rental, and service could not be given to any persons other than club members and their guests. It reads as follows:

"1–Mr. & Mrs. Wukoloff to take charge of all food, beverage and lodgings at Malibou Lake Mt. Club with no lease.

2–Mr. & Mrs. Wukoloff to pay club—

a–5% on all gross of food and beverage sales

b–20% on all room rentals

c–To pay for all gas used in the kitchen

d–To serve dinners from 1.50, 2.00 and up, & ala carte.

Childrens portion at half price.

e–To keep all parts of the club house and club rooms clean within the four walls.

f–To pay all expenses for operation of this business including help and materials used in cleaning

3–Malibou Lake Mt. Club will

a–Keep all electric equipment, plumbing, painting, and decorating in good condition.

b–Furnish electricity and oil for heating club house and rooms.

d–Keep outside of club house in good condition.

e–Buy all stock on hand at termination of business arrangement."

The clubhouse is a U-shaped building, the public rooms and kitchen occupying that portion extending easterly and westerly. The guest rooms are in two wings known as the west wing and the east wing, extending in a northerly direction. The guest rooms in both wings open into what are referred to in the evidence as corridors. The "corridors" are in fact balconies open on the side opposite the rooms. There is a handrail along the outside edge of each balcony. The balcony or corridor serving the rooms on the west wing is level for its entire distance, while that on the east has at about the middle of the wing two steps down as one proceeds northerly. The floor of the corridor or balcony and the steps are painted a maroon or dark red color, there being no stripes on the steps or other indication of the change of level.

Plaintiffs were permitted the use of one room in the building. After occupying a room in the west wing for a few days they moved to one in the east wing. The accident took place about two days after the plaintiffs had moved. The room occupied by them is immediately at the head of the stairway leading from the main building up to the balcony. Prior to the accident Mrs. Wukaloff had never walked along the balcony farther than the door to the room occupied by her and her husband and had no knowledge of the existence of the steps. The club through its manager had charge of the lighting of the corridors. The switch for the lights was located in a private card room on the door to which was a sign reading "Private." The door was kept locked practically all the time, the key being in the possession of the manager. Plaintiffs were never provided with a key and in the manager's absence were unable to reach the switch in order to turn on the lights in the corridors. On the evening in question the manager departed from the clubhouse without turning on the lights. At about 8:00 o'clock in the evening the telephone bell rang in the clubroom on the lower floor adjoining the kitchen where Mrs. Wukaloff was working. Answering the call she was advised that the manager of the club was wanted. Not knowing he was absent she went up the steps leading to the south end of the east balcony and inquired of Mr. Novikoff, the head waiter, whose room adjoined that of plaintiffs, where the manager's room was located. He told her the manager occupied the room at the extreme north end of the corridor. She proceeded in the darkness in that direction and upon reaching the steps fell to the lower level of the corridor and received serious injuries causing her to be confined in a hospital under medical care for several months. Her special damages were about $6,000.

In addition to the verdict for damages the jury answered two special interrogatories propounded by the court: (1) whether or not the relationship between plaintiffs and defendant was that of invitor and invitee, to which the jury answered "Yes"; (2) whether or not their relationship was that of landlord and tenant, to which the answer was "No."

Defendant contends that the relationship created by the agreement of the parties was that of landlord and tenant and therefore defendant is not liable for the damages sustained by Mrs. Wukaloff. In support of this theory defendant cites Beckett v. City of Paris Dry Goods Co., 14 Cal.2d 633, 96 P.2d 122, 124. The facts in that case are entirely different from those in the instant case. Dr. Beckett, an optometrist, occupied space in the defendant's department store where he conducted the optical department of the store. He installed his own equipment, fixtures and showcases. The contract was for a definite term and he was required to provide insurance indemnifying the defendant from liability arising through his negligence or that of his employees. The contract contained all the attributes of a lease. It provided that the plaintiff "cannot assign this lease," referred to "space demised" and provided for "monthly rental," all of which, as the court stated, are the terminology of a lease. The plaintiff fixed his own prices for the merchandise he sold and for his professional services. He sold to the public in general and was not limited to the service of the persons selected by the defendant. In the instant case the memorandum prepared by defendant's representative provided that plaintiffs were to take charge of the food, beverage and lodgings at the club *"with no lease."* The club was operated for the benefit of its members and their guests. Plaintiffs had no election as to who should be permitted to occupy rooms or be served with meals. They were forbidden to rent rooms or to serve food to any person other than a member or his guest. The rent for the use of the guest rooms and the price of meals were fixed by defendant and the period of time during which any member should be permitted to occupy a room was determined by the club. Plaintiffs had nothing to do with the corridors. The agreement required them to keep clean the clubhouse and rooms "within the four walls." The corridors or balconies, open on the side opposite the guest rooms, were not within the four walls of the building. Defendant was to keep the outside of the clubhouse together with the electrical equipment, plumbing and painting in good condition and to furnish electricity and oil for heating the clubhouse and rooms.

[1] From the foregoing evidence it is manifest that the relationship of landlord and tenant was not created by the contract between the parties. Plaintiffs were not lessees but were in the nature of concessionaires.

[2] It was the duty of defendant to exercise ordinary care in keeping its premises in a reasonably safe condition. Defendant maintains that such duty is fulfilled by the facts, as testified by the Building Inspector of the County of Los Angeles and a construction engineer, that the plans for the building were examined and approved by the appropriate county officials, that the building complied with the State Housing Act, Health and Safety Code, § 15000 et seq., the County Building Code and with sound building practice in Los Angeles County, and that the change in the level of the floor of the corridor was made necessary by the natural contour of the ground on which the building was constructed. These facts did not relieve defendant of its obligation to provide a safe passage to persons using the corridor in reaching the northerly end of the building.

[3] The fact that the floor and steps were painted a dark color with nothing to indicate in the darkness a change of level were matters to be considered by the jury in determining whether or not defendant was negligent in its maintenance of its premises. Some of defendant's witnesses testified there was "practically" always a light in the men's room but there is no evidence that the light was burning in that room at the time of Mrs. Wukaloff's accident. The men's room is on the ground floor with a window opening to the north. The evidence does not show whether the light globe in that room, when lighted, was dim or bright, how far its rays extended, or whether the glass in the window was clear, frosted or opaque. Photographs of-

fered in evidence by defendant, taken at night, some containing legends indicating the lights in the rooms along the corridor were illuminated, others that the light in the men's room was burning, show a dense darkness on the floor of the corridor and do not indicate the presence of the steps. There is no evidence that the room lights were burning at the time of the accident. Photographs in evidence taken when the sun was shining show the steps and shadows of the handrail but they are obviously of no value in indicating conditions in the dark.

[4] The owner of a building owes a duty to an invitee to exercise ordinary care and prudence in keeping the premises in a reasonably safe condition so as not to expose him unnecessarily to danger. Neel v. Mannings, Inc., 19 Cal.2d 647, 652, 122 P.2d 576; Dobbie v. Pacific Gas & Electric Co., 95 Cal.App. 781, 788, 273 P. 630.

[5] Defendant pleaded contributory negligence on Mrs. Wukaloff's part. For several days she had occupied a room on the west wing where the corridor is level for its entire length. She moved with her husband to the east wing only a day or two prior to the accident. She had not had occasion to walk along the corridor in that wing and was without knowledge it was different from that on the west wing. Under the contract plaintiffs were not required to do any cleaning or other work outside the four walls; there was no occasion, as far as the evidence shows, for either of them to have been at any point north of their own room or to have observed the condition of the floor of the corridor. Defendant contends that since the handrail along the outer edge of the balcony extended downward where the steps are located Mrs. Wukaloff was negligent in failing to observe a change in level—that she should have grasped the handrail as she walked. This issue and all others raised by defendant were decided by the jury against its contentions and we find no reason for disturbing the verdict.

The facts in the cases cited by defendant on the issue of contributory negligence are so dissimilar from those in the instant case that they can furnish no consolation to defendant. In Powers v. Raymond, 197 Cal. 126, 239 P. 1069, the plaintiff was injured as a result of falling while walking late at night along a dark, unlighted path instead of using the main, well-lighted roadway. In Bruce v. Risley, 15 Cal.App.2d 659, 59 P.2d 847, the plaintiff, after opening a door leading to a dark, narrow stair-landing with which he was unfamiliar, proceeded through the doorway by the light of small matches. In Cornell v. Hearst Sunical, etc., Co., 55 Cal.App.2d 708, 131 P.2d 404, a fisherman who had traversed a wharf in daytime on many occasions and was familiar with the structure and its approaches, fell into the water on a dark night while returning to his boat which was anchored nearby. In Kammerer v. Gallagher, 58 Ill. App. 561, the plaintiff went into a dark passageway between dilapidated houses without knowledge of the condition of the steps therein. Other cases cited by defendant are similarly inapplicable.

[6] Mr. Miller, who had been manager of the club for several weeks before plaintiffs moved into the building and remained for some time thereafter, testified he had fallen in the darkness on three different occasions at the point where Mrs. Wukaloff fell. Since he was defendant's manager and representative on the premises his knowledge of the dangerous condition existing when the balcony lights were not burning is imputed to defendant.

[7] Contrary to defendant's contention, Miller's evidence was admissible for consideration by the jury as tending to show (1) the cause of Mrs. Wukaloff's injury, (2) notice to defendant of the unsafe condition of the corridor, (3) neglect on defendant's part in not correcting the defect, Wills v. Price, 26 Cal.App.2d 338, 344, 79 P.2d 406, and cases cited, and for the purpose of showing that defendant might reasonably have anticipated that persons walking along the corridor were likely to suffer similar accidents. McCormick v. Great Western Power Co., 214 Cal. 658, 664, 8 P.2d 145, 81 A.L.R. 678. Miller's falls had

not occurred so long before Mrs. Wukaloff's as to render evidence thereof inadmissible as being too remote.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

96 Cal.App.2d 159

SPARLING v. HOUSMAN et al.

Civ. 3796.

District Court of Appeal, Fourth District, California.

Feb. 20, 1950.

Action by B. M. Sparling against Roy L. Housman and Ruth N. Housman to recover balance due under building contract.

The Superior Court of Kern County, Norman F. Main, J., entered judgment for part of plaintiff's demand, and plaintiff appealed.

The District Court of Appeal, Mussell, J., held that determination of amount to be deducted from last payment due plaintiff by reason of plaintiff's failure to substantially perform his contract was a question of fact for trial court, and that evidence sustained finding and award granted to plaintiff.

Judgment affirmed.

1. Trial 🔑375

Where parties stipulated that court might view premises, information obtained by court from a view of premises is independent evidence that can be taken into consideration in determining issues of case, and when view is with consent, what is then seen by court is itself "evidence", and may be used alone or with other evidence to support court's finding.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Evidence".

2. Appeal and error 🔑846(5)

Where findings by court are waived by parties, Court of Appeal will presume that every fact essential to support of judgment was proved and found by court.

3. Appeal and error 🔑1008(1)

In action by builder to recover balance due under building contract, determination of amount to be deducted from last payment due builder by reason of builder's failure to substantially perform his contract was a question of fact for trial court which would not be disturbed by Court of Appeal.

4. Contracts 🔑305(2, 3)

Where a contract is made with owner of realty to erect a building on the realty, and there is a breach by builder of his covenant to build it in a good and workmanlike manner, neither occupation of house by owner, after its supposed completion, nor payment of price, though accompanied by knowledge by owner of defective construction, is sufficient, taken alone, to operate as a waiver of breach of covenant.

5. Appeal and error 🔑1008(1)

In action by builder to recover balance due under building contract, whether builder perfected work according to plans and specifications, and whether owners waived their right to recover for builder's failure of performance were questions of fact for trial court.

6. Contracts 🔑322(4)

In action by builder to recover balance due under building contract, evidence sustained finding that house was defectively constructed, and that builder was not entitled to full amount of final payment.

R. C. Donahue, Bakersfield, for appellant.

T. R. Claflin, Bakersfield, for respondents.

MUSSELL, Justice.

Action on building contract. Plaintiff and defendants on May 13, 1946, entered into a written agreement whereby the plaintiff agreed to construct for the defendants a dwelling house and garage on real property situated in the city of Bakersfield. The contract provided that the total cost of construction would be $7,800 and that the plaintiff, a building contractor, would be paid on the following basis: First payment when the form was up; second when the plaster was finished; third when the notice of completion was filed; and the fourth payment thirty days after the filing of such notice. Defendants paid the first three installments but refused to make the final payment of $1,950 on the ground that the plaintiff had failed to construct the buildings in accordance with the contract and the plans and specifications, made a part thereof. The plaintiff thereupon commenced this action for the alleged balance due of $1,950. A trial was had before the court without a jury. Findings of fact and conclusions of law were waived by the parties and the court entered its judgment that the plaintiff's demand of $1,950 be allowed to the extent of $750, thus allowing an offset for breach of the contract in the sum of $1,200.

Rex F. Whittemore, a construction engineer called as a witness in behalf of the defendants, testified that he inspected the dwelling house and garage in question the day before the trial and found that the 8″ x 14″ concrete footings under the foundation walls were not constructed as provided in the plans and specifications; that because of the improper work in the foundation, the house was settling, causing plaster cracks, ill fitting doors, pulling away of base shoes in many places, opening of joints in woodwork and successive cracks in the exterior finish; that in some places the foundation walls were approximately 6 inches in width when an 8-inch width was required; that the "headers" in the garage were 2″ x 4″ where 2″ x 6″ were provided for in the contract; that the plans and specifications called for anchor bolts in the garage and the plates therein were nailed to the concrete floor; that the porch beams were shown to be 6″ x 4″ on the plans and 4″ x 4″ beams were installed; that the ceiling ties in the garage should have been 4 feet on the center instead of in various widths exceeding 5 feet as installed; that there were no diagonal braces in the garage as required; that the vent over the kitchen stove was installed off center "practically missing the stove"; that the specifications provided for the installation of a kitchen sink, sixe 20″ x 30″ and that the actual installation was 15″ x 27″; that the hardwood flooring was surface nailed in places; that a recessed light over the kitchen sink was not installed; that the exterior stucco above the east portion of the porch had scratch or first stucco coat only, and that a facia board or cornice should have been installed around the edge of the roof. Mr. Whittemore testified, when asked what it would cost to replace the foundation and put it in the condition it should have been in the first place, as follows: "Well, if you mean to replace the foundation entirely the way it should have been to start with, it would involve the jacking of the house, jack up the building, tearing out the whole foundation, building new forms, digging new trenches, a lot more difficult job of pouring, correction of all the damage that is in existence there; and I can only give you an estimate gained from an inspection, which is not a cost estimate, but your carpenter work and everything involved would run awfully close to $2000.00."

The witness estimated that a replacement job would vary in cost from $750 to $2,000.

[1, 2] While there was considerable testimony produced by the parties as to the cost of remedying the defects in construction, the judgment of the trial court deducting $1,200 from the amount of the last payment finds substantial support in the evidence. Furthermore, it was stipulated that the court might view the premises, which it did. As was held in Otey v. Carmel Sanitary Dist., 219 Cal. 310, 26 P.2d 308, 309, the information obtained by the court from a view of the premises is "independent evidence that can be taken into consideration in determining the issues of the case" and when the view is with consent, what is then seen by the court is itself evidence and may be used alone or with other evidence to support the court's finding. Noble v. Kertz & Sons Feed &

Fuel Co., 72 Cal.App.2d 153, 159, 164 P.2d 257. In the instant action, as noted, findings were waived by the parties and, under such circumstances, it is presumed that every fact essential to the support of the judgment was proved and found by the court. 24 Cal.Jur. 956; Moreno Mut. Irr. Co. v. Beaumont Irr. Dist., 94 Cal.App.2d 766, 211 P.2d 928; Hughes v. City of Torrance, 77 Cal.App.2d 272, 281, 175 P.2d 290; Bekins Van Lines, Inc., v. Johnson, 21 Cal.2d 135, 137, 130 P.2d 421.

[3] The determination of the amount to be deducted from the last payment by reason of the failure of plaintiff to substantially perform his contract was a question of fact for the trial court and we cannot disturb its finding on appeal. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Dillard v. McKnight, 34 Cal.2d 209, 209 P.2d 387.

Plaintiff contends that the conduct of the defendants in moving into the building and failing to object to the manner in which the work was done constituted a waiver of the performance of the contract and in that connection cites Smith v. Mathews Const. Co., 179 Cal. 797, 179 P. 205. In that case the court held that the departures from the contract were slight, unimportant and immaterial; that they were each and all known of by the defendants and that they were not deceived or injured thereby.

[4] In the instant case, the most serious failure in the performance of the contract was that of the failure to install the concrete footings and this was not observed by the defendants at the time of the installation. The defendant, Roy L. Housman, although present, did not measure the foundations until some time afterward, when he dug under the foundations and ascertained the absence of proper footings. Under these conditions, findings having been waived, it is presumed that the court found that there was no waiver by the defendants. In Leonard v. Home Builders, 174 Cal. 65, 68, 161 P. 1151, 1152, L.R.A.1917C, 322, the court said: "Where a contract is made with the owner of land to erect a building on the land, and there is a breach, by the contractor, of his covenant to build it in a good and workmanlike manner, neither the occupation of the house by the owner, after its supposed completion, nor the payment of the price, though accompanied by knowledge by the owner of the defective construction, is sufficient, taken alone, to operate as a waiver of the breach of the covenant."

[5, 6] The questions whether the plaintiff perfected the work according to plans and specifications and whether the defendants waived their right to recover for failure of performance on the part of plaintiff were factual questions for the court and we cannot say that the evidence does not support the judgment.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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96 Cal.App.2d 171

WIRZ v. WIRZ.

Civ. 14196.

District Court of Appeal, First District,
Division 2, California.
Feb. 21, 1950.

Walter Wirz, Sr. sued Bertha Wirz for a divorce.

From a judgment of the Superior Court in and for the County of San Mateo, Edmund Scott, J., denying a divorce, plaintiff appealed.

The District Court of Appeal, Nourse, P. J., held that the trial court's finding that defendant was not incurably insane was erroneous as contrary to uncontradicted opinion testimony of unimpeached state hospital medical director that defendant was incurably insane within the realm of reasonable probability, but that the court's finding that plaintiff's ability to support defendant was not proved was binding on the appellate court as a finding on a material fact question.

Judgment affirmed.

1. Divorce 🔑128

Proof of fact, such as incurable insanity, to moral certainty, is not required in civil action, as for divorce, but proof of reasonable probability thereof is normally sufficient, and absolute certainty is not required, even where specially strong degree of proof is required or contrary presumption must be overcome. Civ.Code, § 108; Code Civ.Proc. § 1826.

2. Divorce 🔑128

Incurable insanity, as of defendant in divorce suit, need not be proved with more certainty than by well grounded opinion evidence in light of present day medical knowledge. Civ.Code, § 108; Code Civ. Proc. § 1826.

3. Statutes 🔑174

The objective sought to be achieved by statute, as well as evil to be prevented thereby, is prime consideration in its interpretation.

4. Constitutional law 🔑70(3)
Divorce 🔑25

The purposes of statute, authorizing divorce on ground of spouse's incurable insanity, to widen possibility of divorce and prevent evil of permanent union of sane and incurably insane spouses, cannot be thwarted by trial judge because of his disapproval of such purposes, nor defeated by such interpretation of statute by appellate court as would make it unenforceable. Civ.Code, § 108.

5. Divorce 🔑128

Opinion evidence, such as medical expert's opinion that defendant in divorce suit is incurably insane, is not conclusive on court. Civ.Code, § 108.

6. Evidence 🔑571(1)

The rule that uncontradicted testimony of witness, not impeached or discredited, may not be arbitrarily disregarded, applies to medical expert's opinion evidence.

7. Appeal and error 🔑1011(1)
Evidence 🔑594

A finding of trier of facts on question as to which there is any real conflict in evidence is conclusive on appeal, but such trier cannot arbitrarily or capriciously disregard unimpeached witnesses' uncontradicted entirely probable testimony.

8. Divorce 🔑128

In husband's suit for divorce on ground of wife's incurable insanity, trial judge's finding that defendant was not incurably insane was erroneous as contrary to uncontradicted testimony of unimpeached medical director of state hospital, wherein defendant had been confined for over three years under court commitment, that defendant, in such witness' opinion was incurably insane in realm of reasonable probability. Civ.Code, § 108; Code Civ.Proc. § 1826.

9. Divorce 🔑244

The purpose of statute requiring court, granting divorce on ground of spouse's incurable insanity, to make appropriate order for such spouse's support by spouse granted divorce or require bond therefor is to permit bond when court is not satisfied that ability of spouse granted divorce to support insane spouse is proved with absolute certainty. Civ.Code, § 108.

10. Appeal and error 🔑1010(1)

A trial court's fact finding, supported by competent evidence, may not be disturbed on appeal.

11. Divorce 🔑286

In husband's suit for divorce on ground of wife's incurable insanity, trial court's finding that plaintiff's ability to support defendant was not proved was binding on appellate court as finding on material fact question. Civ.Code, § 108.

◆

Millington, Dell'Ergo, Weeks & Morrissey, Redwood City, attorneys for appellant.

Louis B. Dematteis, District Attorney, County of San Mateo, Elinor Louise Falvey, Deputy District Attorney, County of San Mateo, Redwood City, attorneys for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for divorce charging his wife with "incurable insanity" under the provisions of section 108 of the Civil Code. The trial court denied the decree. The principal question involved on the appeal is the quantum of proof required to establish "incurable insanity."

The code section reads in part: "A divorce may be granted on the grounds of incurable insanity only upon proof that the insane spouse has been confined to an institution * * * for a period of at least three continuous years immediately preceding the filing of the action and upon the testimony of a member of the medical staff of said institution that such spouse is incurably insane." The section requires the court in granting the decree of divorce to make an appropriate order for the support of the spouse, or require a bond therefor.

To prove the issue of "incurable insanity" the plaintiff offered the evidence of Dr. Walter Rapaport, Superintendent and Medical Director of Agnew State Hospital where defendant had been confined since December 15, 1938, under commitment by the superior court. The doctor testified that, in his opinion, the patient would continue to get progressively worse, that "in the realm of reasonable probability, that will be the course." Question: "[I]t is your opinion, is it not, that she is incurably insane and will never be released?" Answer: "That is my opinion." On cross examination Dr. Rapaport testified in answer to a question by the court: "What is your diagnosis, Doctor?" Answer: "The diagnosis is manic depressive; and then they have recurrences. It used to be called circular insanity in the old days, but the condition, if it progresses and remains without improvement over a period of years, indicates a chronic form of manic depressive, from which they do not get well." The trial court did not find that any of this testimony was untrue. It's decision was based upon the ruling that it was necessary for plaintiff to prove that defendant was "absolutely incurably insane; and I don't think any human being can say that about anybody."

The finding of fact on this issue is "That it is not true and that it is not sustained by the evidence submitted that the said defendant Bertha Wirz is incurably insane."

The question presented here is whether the finding that defendant was not incurably insane is contrary to the evidence where the member of the medical staff testified that according to his best opinion defendant was incurably insane, but that he could not go beyond the realm of reasonable probability.

There are no California cases with respect to the proof of incurable insanity and very few outside this state. The authority nearest in point, although there still is a minor distinction, is Tipton v. Tipton, 1949, 309 Ky. 338, 217 S.W.2d 799. As in our case, the trial judge, who disagreed with the statute permitting divorce on the ground of incurable insanity, KRS 403.020, denied a divorce where the experts testified that according to their opinion defendant would probably not recover and would have to stay permanently in an institution, but refused to say with respect to any patient that he or she was absolutely incurably insane. The Court of Appeals reversed with directions to grant the divorce stating, 217 S.W.2d at page 801: "Few physicians would testify positively under oath that any mental condition, or any disease for that matter, is incurable. All they can say is that from their experience and in the light of present day medical knowledge, it is their *opinion* that a certain disease is incurable or mental condition is permanent. Many diseases once thought incurable are now curable as medical science advances. If the statute being construed is to have any practical value and accomplish the evident intention of the legislative body, it must be reasonably construed and not given a strained and unnatural construction. We think the expert testimony in this case justifies the court in finding that appellee's condition is permanent and that she will never be able to resume her status as a wife to appellant and that the lower court erred in dismissing appellant's petition." See also statements to the same effect with respect to propriety of divorce on the ground of incurable insanity. Dodrer v. Dodrer, 1944, 183 Md.

413, 37 A.2d 919 and State v. Brown, 1937, 213 Ind. 118, 11 N.E.2d 679, 682, 13 A.L.R. 1243. The latter case also held that incurable insanity is a recognized mental state which may be established by evidence.

There is another line of cases which has led to judicial discussion of "incurability." A Colorado statute, Rev.St. 1908, § 6068, makes "obtaining of a fee on the representation that a manifestly incurable disease can be permanently cured" a ground for revocation of a medical license. In Graeb v. State Board, 55 Colo. 523, 139 P. 1099, 1101, 47 L.R.A.,N.S., 1063, the Supreme Court of Colorado held 4 to 3 that that provision was invalid for uncertainty because, among other grounds, incurability could be no more than a matter of well-grounded opinion and it could not be said at any point short of death that it is a "manifest" fact. The minority argued that the statute should be interpreted more widely according to its intent to protect hopeless patients from being defrauded by physicians. Both in the Graeb case and in Freeman v. State Board of Medical Examiners, 1915, 54 Okl. 531, 154 P. 56, 58 L.R.A. 1916D, 436, where a statute, Rev. Laws 1910, § 6905, of the same tenor as the one of Colorado did not contain the word "manifest," the principal question was whether the statute applied to promising care to a patient ill in an incurable degree from an illness not necessarily incurable, like tuberculosis. The Oklahoma Court expressly followed the Colorado minority and held that an interpretation according to legislative intent and purpose required the right to revoke the license of a physician who takes a fee for the cure of a patient whose disease has reached a state incurable "according to the [then] general state of knowledge of the medical profession."

[1] We are in accord with the ruling in Tipton v. Tipton, supra, although there is this small distinction that the Kentucky statute expressly states that it is sufficient that at least two psychiatrists declare that "in their opinion" the insanity is permanently incurable. Although our section 108, Civil Code does not specifically mention "opinion" it would seem that our general theory of proof leads to the same effect. Section 1826, Code Civ.Proc. expressly states that absolute certainty is not required "because such proof is rarely possible." Moral certainty or proof which produces conviction in an unprejudiced mind is sufficient even in criminal cases. The moral certainty is not required in civil cases; there "reasonable probability", as testified to by Dr. Rapaport, is normally sufficient and is used as a counterpart to "preponderance of the evidence." Murphy v. Waterhouse, 113 Cal. 467, 473, 45 P. 866, 54 Am.St.Rep. 365. In Liverpool, etc., Ins. Co. v. Southern Pacific Co., 125 Cal. 434, 440, 441, 58 P. 55, 58, it is said: "In civil cases which are decided in favor of the litigant upon a mere preponderance of evidence, the rule of decision is, after all, but a rule of probability * * *." Compare also Estate of Moramarco, 86 Cal.App.2d 326, 328, 338, 339, 194 P.2d 740. Even where a specially strong degree of proof is required, or where a presumption to the contrary must be overcome, absolute certainty (conclusive proof) is not required. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 446, 159 P.2d 958; In re Estate of Duncan, 9 Cal.2d 207, 217, 70 P.2d 174; In re Estate of Pepper, 158 Cal. 619, 622, 122 P. 62, 31 L.R.A.,N.S., 1092; Freese v. Hibernia Sav., etc., Soc., 139 Cal. 392, 395, 73 P. 172. In Simonton v. Los Angeles Trust & Sav. Bank, 205 Cal. 252, 258, 270 P. 672, 675, it is pointed out that there is no hard and fast rule for the quantum of proof required under sec. 1826, Code Civ.Proc. in a special case. All the law requires is proof "reasonably certain in view of all the circumstances."

[2-4] As pointed out in Tipton v. Tipton, and Graeb v. State Board, supra, with respect to incurability of insanity no higher degree of proof than well grounded opinion evidence in the light of present day medical knowledge can be obtained. To require more certainty is unreasonable and would frustrate the intent of the legislature. And it is said: "the objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in its interpretation." Rock Creek, etc., Dist. v. County of Calaveras, 29 Cal.2d 7, 9, 172 P.2d 863, 865; 23 Cal.Jur. 764. The objective sought to be achieved was the widen-

ing of the possibility of divorce, and the evil to be prevented the permanent union of a sane spouse with an insane one who does not offer hope of recovery. The disapproval by the trial court of that purpose cannot permit him to thwart it nor may we defeat the purpose of the statute by an interpretation which would make it unenforceable.

[5-8] The question remains whether the court was bound by the expert testimony of Dr. Rapaport. In the Dodrer case, 37 A.2d at page 922, it was held that although the statute requires the affirmative opinion of certain experts, such opinion is not conclusive on the court. This is in accord with the general rule as to opinion evidence in California which is held not to be conclusive. Spencer v. Collins, 156 Cal. 298, 307, 104 P. 320, 20 Ann.Cas. 49; May v. Farrell, 94 Cal.App. 703, 715, 271 P. 789; Bernstein v. Bernstein, 80 Cal.App.2d 921, 925, 183 P.2d 43; 10 Cal.Jur. 971. But in Re Estate of McCollum, 59 Cal.App.2d 744, 750, 140 P.2d 176, 179, the only medical expert testified that Mrs. McCollum was incompetent to make a will. The court said: "While this opinion was entitled to be carefully weighed by the trial judge it was not conclusive on the subject, * * * and like the evidence of any other witness could be rebutted by other satisfactory evidence." But in our case there is no rebutting evidence whatever. The rule that uncontradicted testimony of a witness, in no way impeached or discredited, may not be arbitrarily disregarded, Mantonya v. Bratlie, 33 Cal.2d 120, 127, 199 P.2d 677, 681, applies also to medical expert opinion evidence. 32 C.J.S., Evidence, § 569, p. 397; Levey v. Minott, 214 App.Div. 192, 211 N.Y.S. 883. In the Mantonya case our Supreme Court said, 33 Cal.2d at page 127, 199 P.2d at page 681: "where there is any real conflict in the evidence the finding of the trier of fact is conclusive. But the trier of fact is not entitled, arbitrarily or upon mere caprice, to disregard uncontradicted, entirely probable testimony of unimpeached witnesses." The rule is pertinent here because the trial judge expressly commended the expert witness for his testimony and stated that he rejected it because he did not "like the policy of the law. I think it is the most unjust law ever enacted, and until it is proved this decree is denied."

[9] On the second ground little need be said. If the trial court was not satisfied with the showing of plaintiff's ability to support the defendant for the remainder of her life expectancy it was authorized by the statute to require a bond therefor "as the circumstances require."

The evidence of plaintiff's ability to support defendant was meager and unsatisfactory as proof. The complaint alleged that the parties owned community property consisting of the home in Redwood City and that plaintiff had the ability to and was willing to support the defendant "for the rest of defendant's life." The ownership of the realty was conceded. Proof was made that plaintiff was employed at wages of $1.88 an hour with reasonable expectancy that the employment would continue. There was no proof of the value of the real property or of the liquitable value of defendant's interest therein. There was no offer to post a bond, and no suggestion of plaintiff's ability to secure payment of the costs of defendant's support. It was shown that for the past ten years she had been under the care of the State and that nothing had been paid by plaintiff for that care. Clearly the purpose of the statute is to permit a bond when the court is not satisfied with the proof that plaintiff's ability to support is absolutely certain. The power of the court under this section is fully considered in Tripoli v. Crivello, 88 Cal.App.2d 760, 99 P.2d 726, where the community property was ordered sold and the wife's share put in trust to cover the cost of her maintenance in the state institution. This provision is designed to make the statute available to those in poor financial circumstances as well as to those who have ample funds to pay for their separation from an insane spouse.

[10, 11] However, since the rule of procedure is settled that a finding of the trial court may not be disturbed on appeal when supported by competent evidence, we must hold that the finding that plaintiff's ability to support the defendant was not proved is

a finding on a material question of fact which is just as binding as an affirmative finding that a material issue has been proved.

Judgment affirmed.

GOODELL, J., concurs.

DOOLING, Justice.

I concur. While I appreciate the propriety of the legislature's making any reasonable provision for the future protection of the insane spouse and of the state where a divorce is granted on the ground of incurable insanity, I question the wisdom and justice of making that provision so sweeping that the statute gives rights to the rich while it denies the same rights to the poor. Nevertheless the legislature has seen fit to condition the right to divorce on the ground of incurable insanity on a showing "that there is reasonable ability to support the insane spouse for the remainder of the life expectancy or that such insane spouse has property sufficient" for that purpose. Sec. 108, Civ.Code. The trial court found that these conditions do not exist in this case, the finding has substantial evidentiary support, and under the existing statute this justifies the judgment denying the divorce.

96 Cal.App.2d 119

SIMMONS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 17420.

District Court of Appeal, Second District, Division 3, California.
Feb. 17, 1950.

Rehearing Denied March 6, 1950.
Hearing Denied April 17, 1950.

Mrs. Helene Simmons filed a petition against the Superior Court of the State of California in and for the County of Los Angeles to restrain the court from proceeding further in an action pending before the Superior Court until final determination of an action between the same parties and involving the same subject matter which was pending in another state.

The District Court of Appeal, Vallée, J., held that the Superior Court abused its discretion in denying defendant's motion for stay of proceedings until final decision in court of sister state.

Peremptory writ of mandate issued.

1. Abatement and revival 🔑4
Courts 🔑475(1)
Prohibition 🔑10(1)

The pendency of a prior action in a court of competent jurisdiction, predicated on same cause of action and between same parties, constitutes good ground for abatement of a later action within same jurisdiction either in same court or in another court having jurisdiction, and first court to assume and exercise jurisdiction in a particular case acquires exclusive jurisdiction and prohibition lies to restrain another court from proceeding if it is threatening to do so.

2. Abatement and revival 🔑4

To "abate" a suit is to put an end to its existence.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Abate".

3. Abatement and revival 🔑4

Abatement is ordinarily a matter of right.

4. Abatement and revival 🔑13
Action 🔑69
Courts 🔑476

Generally, the pendency of a prior suit in one state cannot be pleaded in abatement or in bar to a subsequent suit in another state even though both suits are between same parties and upon same cause of action, but court in which second action is brought may in its discretion stay or suspend that suit, awaiting decision of the first suit, or, influenced by a spirit of comity, may refuse to entertain it, if same relief can be awarded in prior suit.

5. Courts 🔑493(2)

In conformity with rule of comity, a federal court which first takes subject matter of litigation into its control to administer rights and remedies with relation to specific property, obtains thereby jurisdiction so to do, to exclusion of exercise of a like jurisdiction by other tribunals, the powers of which are sought to be invoked by parties or their privies to original action.

6. Courts 🔑514

California courts cannot take jurisdiction of a proceeding to remove a trustee where a proceeding to remove trustee is first commenced in sister state where trustee was appointed.

7. Courts 🔑475(1)

The rule which forbids a later action in the same state between the same parties involving same subject matter rests upon principles of wisdom and justice, to prevent vexation, oppression and harassment, and to prevent unnecessary litigation and a multiplicity of suits.

8. Action 🔑69

Where an action is brought in sister state, and a subsequent action is brought in California between same parties and involving same subject matter, California court may stay proceedings in action brought in California court until final decision in first action.

9. Action 🔑69

Where wife brought divorce action in Texas and property rights were involved, and husband brought subsequent action in California against wife involving same subject matter, and parties were residents of Texas, and Texas action would determine all issues, and trial there was more likely to accomplish full justice than trial in California, and trial in California would subject wife to unnecessary inconvenience and expense, California court abused its discretion in denying wife's motion to stay proceedings in California court until final decision in Texas court.

10. Judgment 🔑829(3)

Where action in California court was removed to federal district court, which remanded case to California court for lack of diversity of citizenship, holding that plaintiff and defendant were residents of sister state was res judicata on petition of defendant to restrain further proceedings in California action until final decision in another case between same parties and involving same subject matter brought in sister state.

11. Divorce 🔑249(1, 3), 252

Under Texas Law district court in action for divorce can decree division of personalty, separate and community, of parties in such manner as in its discretion it deems just and right, and can decree that specific property is owned by one or other of the spouses.

12. Courts 🔑18

Under the Texas law, district court can compel a party of whom it has jurisdiction to execute a conveyance of realty situate in another state.

13. Judgment 🔑822(4)

A decree of Texas District Court compelling a party of whom it has jurisdiction to execute a conveyance of realty situate in another state is entitled in California to force and effect of record evidence of equities therein determined unless decree can be impeached for fraud.

14. Courts 🔑516

On petition of defendant to restrain further proceedings in action brought subsequent to action in Texas between same parties and involving same subject matter, law of Texas determined when court of Texas acquired jurisdiction of action.

15. Courts 🔑21

Under Texas law, where a petition is filed and a process of court is invoked thereon, court acquires jurisdiction of subject matter even though process is not served upon defendant.

16. Receivers 🔑70

Under Texas law, the time of appointment of a receiver is time when a receivership commences to operate so as to bind property subject to receivership and to vest title in receiver, and at that time the jurisdiction of the court attaches to, and receiver is entitled to, the property, and it is in custody of the law or the court, although receiver has not qualified and has not actually taken possession of the property.

17. Receivers 🔑65

Effect of appointment of a receiver by Texas court was to place receiver constructively in possession of property within state of Texas specified in order.

18. Receivers 🔑54

The appointment of a receiver who takes property into his possession impresses action with judicial characteristics of a proceeding in rem.

19. Action 🔑69

Where rights of parties to a second action between same parties cannot properly be determined until questions raised in first action are settled, the second action should be stayed.

20. Action 🔑69

Where a correct decision in action calls for construction of laws of a foreign jurisdiction, and an action between same parties involving same subject matter is pending in foreign jurisdiction, California courts should await decision in action in foreign jurisdiction.

21. Equity 🔑51(1)

Equity abhors a multiplicity of actions.

22. Courts 🔑511

Courts should be liberal and just in determining questions which involve conflicts of jurisdiction, and races between parties likely to result in unseemly controversy between courts of different states should be avoided if possible.

23. Courts 🔑511

Courts must give preference to principles and methods of procedure by which tribunals of states may co-operate as harmonious members of judicial system.

24. States 🔑5

Comity between states should be encouraged.

25. Appeal and error 🔑106

Order denying motion to stay further proceedings in action brought in California until final decision in prior action in sister state between same parties and involving same subject matter was nonappealable. Code Civ.Proc. § 963.

26. Prohibition 🔑3(3)

Where wife brought divorce action in Texas and property rights were involved and husband subsequently brought action in California against wife wherein same subject matter was involved, remedy of wife by appealing from judgment rendered after trial of action brought in California was not an adequate remedy precluding Supreme Court from restraining California court from proceeding further in action until final decision in Texas. Code Civ.Proc. § 963.

27. Mandamus 🔑28

Mandate lies to control judicial discretion which has been abused.

28. Mandamus 🔑31
Prohibition 🔑3(1)

Where wife brought divorce action in Texas, and husband subsequently brought action in California against wife, wherein same subject matter was involved, and wife was entitled to a stay of further proceedings in California until final decision in Texas, writ of mandate and not writ of prohibition was proper remedy of wife.

29. Courts 🔑209(2)

Where wife brought divorce action in Texas, and husband subsequently brought action in California against wife wherein same subject matter was involved, and Supreme Court had all facts before it, and circumstances entitled wife to stay of further proceedings in California until final decision in Texas, Supreme Court would stay proceedings although wife improperly sought relief pursuant to writ of prohibition rather than pursuant to writ of mandate.

◆

Gibson, Dunn & Crutcher, Sherman Welpton, Jr., Los Angeles, for petitioner.

Joseph Scott, Los Angeles, for real party.

No appearance for respondent.

VALLEE, Justice.

Petitioner seeks a writ of prohibition to restrain the Superior Court of the County of Los Angeles from taking any further proceedings in an action entitled "Frank A. Simmons v. Mrs. Frank A. Simmons, et al.," No. 555768, until the final determination of an action pending in the District Court of Harris County (Houston), Texas, entitled "Helene Simmons v. Frank A. Simmons," No. D-363483. Petitioner Helene Simmons, referred to as the "wife", is the same person as Mrs. Frank A. Simmons. Frank A. Simmons is referred to as the "husband."

February 10, 1949, the wife commenced an action against the husband in the District Court of Harris County, Texas. In her petition she prayed for (1) a divorce; (2) a restraining order enjoining the husband from withdrawing funds from certain corporations, all of the stock of which was alleged to be owned by her, and from disposing of any of said stock; (3) a determination of property rights between the wife and the husband; (4) the appointment of a receiver of the stock and seals of the corporations; (5) an accounting; and (6) general relief. The same day the Texas court appointed a receiver to take charge of "all stock certificates now in the possession of the Defendant, or under his control, and the corporate seals of the following corporations: Wynn-Crosby Drilling Company, Crosby Drilling Corporation, and A. W. Crosby, Inc.," and issued an order restraining the husband from using the stock certificates in said corporations for any purpose. Later the wife filed an amended petition praying also (1) for a decree adjudging specified property to be the separate property of the wife and that the husband has no right, title or interest therein, (2) that she recover from the husband all of her stocks and other property and all money owing by him to her, and (3) that a lien be impressed upon all property of the husband to secure such obligations, and for foreclosure of the lien.

February 15, 1949, the husband commenced an action against the wife in respondent court. In his complaint he alleged he is the owner of an undivided half interest in certain stock issued to the wife (being all of the stock alleged by the wife in the Texas action to be her separate property), in United States Savings Bonds issued to the wife, in bank accounts in the name of the wife, in safe deposit box contents (the safe deposit boxes being in the name of the wife), and in two parcels of real estate located in California standing of record in the name of the wife. He alleged that the property stands for convenience in the sole name of the wife, and that the wife claims the entire interest thereof adverse to him. He prayed that the court declare and decree the rights and duties of the parties in respect to each other and "in respect to, in, under or upon the property." Upon the filing of the complaint the stock certificates and savings bonds were deposited with the clerk of the court.

March 26, 1949, the wife appeared in the California action by filing an answer.

May 2, 1949, the husband appeared in the Texas action by filing a plea in abatement and an answer.

July 26, 1949, upon motion of the wife, the California action was removed to the United States District Court for the Southern District of California. The removal was based on the allegation of the husband in his complaint that he is a resident of California and of the wife in her answer that she is a resident of Texas.

September 23, 1949, after a petition to remand by the husband and a contest thereof, the California action was remanded to the state court for the reason that diversity of citizenship did not exist. The United States court expressly found and decreed that at the time of the commencement of the California action, and at all times since, the husband and the wife were residents of Texas.

October 17, 1949, the wife moved respondent court for an order staying all further proceedings in the California action until the final determination of the Texas action. Her motion was denied. This proceeding followed.

Petitioner bases her petition upon the grounds (1) the Texas court acquired prior jurisdiction over the persons and subject matter of the case, its authority continues until the matter is completely and finally disposed of, and the California court should not interfere with the Texas court's action; and (2) the California court, as a matter of comity, should stay proceedings in the California action pending final determination of the Texas action which will be determinative of the issues involved in the California action.

[1] It is settled California law that the pendency of a prior action in a court of competent jurisdiction, predicated on the same cause of action and between the same parties, constitutes good ground for abatement of a later action within the same jurisdiction either in the same court or in another court having the jurisdiction. 1 Cal. Jur. 23, sec. 4; and it is held that the first court to assume and exercise jurisdiction in a particular case acquires exclusive jurisdiction and prohibition lies to restrain another court from proceeding if it is threatening to do so. Browne v. Superior Court, 16 Cal.2d 593, 597, 107 P.2d 1, 131 A.L.R. 276; Myers v. Superior Court, 75 Cal.App.2d 925, 930, 172 P.2d 84; Rilcoff v. Superior Court, 50 Cal.App.2d 503, 123 P.2d 540; Wright v. Superior Court, 43 Cal.App.2d 181, 183, 110 P.2d 529.

The rule which governs in the case at bar is that which applies between courts of different states.

[2–4] Petitioner did not seek an "abatement" of the California action. She merely sought a "stay of proceedings." While an "abatement" and a "stay of proceedings" are in some respects similar, they are not identical. To abate a suit is to put an end to its existence. Dodge v. Superior Court, 139 Cal.App. 178, 181, 33 P.2d 695, 34 P.2d 501. Abatement is ordinarily a matter of right. The general rule is that the "pendency of a prior suit in one state cannot be pleaded in abatement or in bar to a subsequent suit in another state even though both suits are between the same parties and upon the same cause of action." 1 Am.Jur. 42, sec. 39. However, "the court in which the second action is brought may in its discretion stay or suspend that suit, awaiting decision in the first one, or, influenced by a spirit of comity, may refuse to entertain it, if the same relief can be awarded in the prior suit." 1 Am.Jur. 44, sec. 39. In Dodge v. Superior Court, 139 Cal.App. 178, 33 P.2d 695, 34 P.2d 501, the superior court had stayed proceedings in an action until the final determination of an action first commenced and pending in the state of Washington between the same parties and involving the same subject matter. A writ of mandate was sought to compel the superior court to proceed with the trial of the action. In denying the writ, the court stated, 139 Cal.App. at pages 181–182, 33 P.2d at page 696, 34 P.2d 501: "While it is unquestionably the law that the pendency of a prior action in another state between the same parties, involving the same cause of action, does not entitle a party as a matter of right to an abatement of a second suit, we think it is equally true that it is within the discretion of the court in which the second action is pending to stay the same until after the decision of the first (Beneke v. Tucker, 90 Or. 230, 176 P. 183), and that the principle of comity between the states calls for the refusal on the part of the courts of this state to proceed to a decision before the termination of the prior action (Sulz v. Mutual Reserve Fund Ass'n, 145 N.Y. 563, 40 N.E. 242, 28 L.R.A. 379); and in our opinion the fact that the first case, as here, after a long trial, has resulted in a decision on the merits which is before the Supreme Court of the state on appeal, would make a refusal to so stay the second action almost an abuse of discretion by the trial court." On a later appeal after the Washington judgment had been affirmed on appeal, it was held that it was res judicata and binding on the plaintiff in the California action. Canfield v. Scripps, 15 Cal.App.2d 642, 59 P.2d 1040.

[5, 6] In conformity with the rule of comity a federal court "which first takes the subject-matter of a litigation into its control, for the purpose of administering the rights and remedies with relation to specific property [mining claims], obtains thereby jurisdiction so to do, to the exclusion of the exercise of a like jurisdiction by other tribunals [a California court], the

powers of which are sought to be invoked by parties or their privies to the original action." Cutting v. Bryan, 206 Cal. 254, 257, 274 P. 326, 327, certiorari denied 280 U.S. 556, 50 S.Ct. 16, 74 L.Ed. 611. California courts are not warranted in taking jurisdiction of a proceeding to remove a trustee where a proceeding to remove the trustee is first commenced in Arizona where the trustee was appointed and "when it [the California court] assumes to act, it is acting improperly and in excess of its rightful authority." Schuster v. Superior Court, 98 Cal.App. 619, 628, 277 P. 509, 513. The fruits of the recognition of the rule of comity "have been so beneficent, when applied to courts of concurrent jurisdiction created by different sovereignties, as to justify the conclusion that it is not only a rule of comity, but one of necessity." Phelps v. Mutual Reserve Fund Life Ass'n., 6 Cir., 112 F. 453, 465, 61 L.R.A. 717, and "a court should ordinarily decline to entertain jurisdiction of the issue under the doctrine of comity." Moody v. Branson, 192 Okl. 327, 136 P.2d 925, 928.

[7, 8] The rule which forbids a later action in the same state between the same parties involving the same subject matter rests upon principles of wisdom and justice, to prevent vexation, oppression and harassment, to pervent unnecessary litigation, to prevent a multiplicity of suits,—in short, to prevent two actions between the same parties involving the same subject matter from proceeding independently of each other. We think there is no distinction in reason or difference in principle between a case where a later action between the same parties involving the same subject matter is commenced in the same state and a case where a later action between the same parties involving the same subject matter is commenced in another state. If proceedings should be stayed in the first case mentioned, it is in order to avoid a multiplicity of suits and prevent vexatious litigation, conflicting judgments, confusion and unseemly controversy between litigants and courts. Any and all of this may occur where the later action is commenced in another state, as well as where it is commenced in the same state. 14 Am.Jur. 436, sec. 243.

Thus the question is whether respondent court abused its discretion in denying the motion of the wife to stay proceedings until the final determination of the Texas action. Evans v. Evans, Tex.Civ.App., 186 S.W.2d 277, 279; Cohen v. Cohen, Tex.Civ.App., 194 S.W.2d 273, 275-276; Peacock v. Lutz & Schramm Co., 171 App.Div. 256, 157 N.Y.S. 175; Levy v. Pacific Eastern Corporation, 154 Misc. 655, 277 N.Y.S. 659; Oppenheimer v. Carabaya Rubber & Nav. Co., 145 App.Div. 830, 130 N.Y.S. 587; Dotson's Adm'r v. Ferrell, 293 Ky. 470, 169 S.W.2d 320, 321; Moore v. Maryland Casualty Co., 74 N.H. 47, 64 A. 1099; Anno: 81 L.Ed. 176; 1 C.J.S., Abatement and Revival §§ 14, 15, page 41; Actions, § 133, pages 1405, 1410; 21 C.J.S., Courts, § 548, page 855; 1 C.J. 1165, sec. 426. 1 C.J.S., Actions, § 133, page 1410.

[9, 10] We think it manifest that respondent court abused its discretion in not staying, as a matter of comity, further proceedings in the California action until the final determination of the Texas action. The parties are residents of Texas. The decision of the United States District Court on this question is res judicata. Texarkana Telephone Co. v. Bridges, 75 Ark. 116, 86 S.W. 841, 5 Ann.Cas. 246; 54 C.J. 333, sec. 253, p. 367, secs. 328-339; 45 Am.Jur. 918, sec. 154, p. 946, sec. 196, p. 950, sec. 203; Anno: 5 Ann.Cas. 247; Ann.Cas.1912A, 237; cf. Bernhard v. Bank of America, 19 Cal.2d 807, 813, 122 P.2d 892. They were married September 30, 1944. At that time the wife was a wealthy widow, possessed of real and personal property of the approximate value of one million dollars. Among her properties were all of the stock except 1200 shares in two oil companies, Wynn-Crosby Drilling Company and A. W. Crosby, Inc., Texas corporations. Crosby Drilling Company, a corporation organized under the law of Louisiana, was owned by Wynn-Crosby Drilling Company. The 1200 shares at that time were owned by her son and were acquired by her shortly after her marriage. The principal place of business and office of each corporation is, and always has been, in Houston, Texas.

None of the corporations has ever done any business in California. The wife says that no stock in these companies has ever been issued or transferred to the husband. The persons who have kept the records of the corporations are in Houston, Texas. For more than two years the wife has been seriously ill, and since September of 1948, has required the constant care and supervision of a registered nurse. She is in a critical physical condition and unable to appear personally at a trial of the California action. She is able to appear in court in Texas for short periods.

In her complaint in the Texas action the wife avers, in addition to facts constituting cruelty, that she has been a resident of Texas for more than twenty years and that she has maintained a summer residence in Pacific Palisades, California (real estate acquired before her marriage in which the husband in the California action alleges he has a half interest), for the past three or four years; that the husband by means of fraud, specifically averred, has gained control of the stock and management of the corporations; and that the stock of the corporations is her separate property. These averments are denied by the husband. In his answer in the Texas action he alleged the property claimed by the wife is jointly owned by the wife and the husband.

The property claimed by the wife to be her separate property in the Texas action includes all of the property in which the husband in the California action alleges he has a half interest. It was stated at the oral argument, and not denied, that a short time before the Texas action was filed the husband, without the knowledge or consent of the wife, flew from California to Texas, obtained the stock certificates, which are not endorsed, and the United States Savings bonds from a safe deposit box, immediately flew back to California, and on February 15, 1949, commenced the California action and deposited the certificates and bonds with the clerk of respondent court. These certificates and bonds are all issued to the wife. Most of them were issued prior to the marriage of the parties.

The Texas court, on the day the action was commenced there, appointed a receiver of the stock, the subject of both actions, and the seals of the corporations. The receiver was not able to take the stock certificates into his possession because the husband had removed them from Texas. It is not shown that the receiver did not take the seals of the corporations into his possession. We assume that he performed his official duty and did so. The property in which the husband in both the Texas and the California actions claims a half interest stands in the name of the wife and is presumptively her separate property. Neither the complaint of the husband in the California action, nor his answer in the Texas action, discloses the facts as to how he acquired a half interest in the presumptively separate property of the wife. They merely allege that he is the owner of an undivided half interest therein. The property which is the subject of the California action is and was prior to the commencement of that action the subject of the Texas action. The Texas action seeks a determination of the rights of the wife and the husband in this property. The cause of action alleged in the California action involves a determination of the rights of the wife and the husband in the same property. All the witnesses, with the possible exception of the husband who is a resident of Texas, and all books and records pertaining to the ownership of the property involved and necessary to establish the facts common to both actions, are in Texas.

The wife has repeatedly sought to bring the Texas action to an early trial. On each occasion her efforts have been opposed by the husband. On November 10, 1949, the Texas court made an order which recited that the court had received the promise and assurance of the attorney for the husband that no attempt would be made by the husband to bring the California action on for trial and that the court relying upon said promise and upon other matters ordered: "It is Accordingly Ordered, on this 10th day of November, 1949, that the above entitled and numbered cause, in which the Plaintiff announced 'ready' for trial at the call of the docket on the morning of November 4, 1949, and at which time the Defendant announced 'not ready', be continued or postponed until the trial week of this Court beginning November 21, 1949, and the said Defendant's motion for continuance is granted to that extent and is otherwise denied; and it is Further Ordered that the above entitled and numbered cause be preferentially set for trial over all other cases set on the jury docket for the week beginning November 21, 1949, and all costs of this Motion for Continuance are charged against the Defendant."

[11-13] The Texas action and the California action are between the same parties and involve the same subject matter. The Texas action will be determinative of all issues included in the California action. Under the law of Texas the court has the power in an action for divorce to decree a division of the personal property, separate and community, of the parties in such manner as in its discretion it deems just and right. The court has power to determine and decree that specific property is owned by one or the other of the spouses. Jones v. Jones, Tex.Civ.App., 211 S.W.2d 269; Tims v. Tims, Tex.Civ.App., 201 S.W.2d 865, 868; McGarraugh v. McGarraugh, Tex.Civ.App., 177 S.W.2d 296; Dale v. Dale, Tex.Civ.App., 141 S.W.2d 718; Grissom v. Grissom, Tex.Civ.App., 137 S.W.2d 227; Scott v. Ft. Worth Nat. Bank, Tex.Civ.App., 125 S.W.2d 356, 362; Helm v. Helm, Tex.Civ.App., 291 S.W. 646, 649; Hedtke v. Hedtke, 112 Tex. 404, 248 S.W. 21; Rudasill v. Rudasill, Tex.Civ.App., 219 S.W. 843; 15 Tex.Jur. 580, sec. 105 et seq.; 4 Tex.Jur.Ten-Yr.Supp. 336, sec. 105 et seq. Under the law of Texas the court also has power by decree to compel a party of whom it has jurisdiction to execute a conveyance of real property situate in another state, Texas & P. Ry. Co. v. Gay, 86 Tex. 571, 26 S.W. 599, 605, 25 L.R.A. 52; Fain v. Fain, Tex.Civ.App., 6 S.W.2d 403, 407; Baughan v. Goodwin, Tex.Civ.App., 162 S.W.2d 732, 736, and such a decree is entitled in California to the force and effect of record evidence of the equities therein determined unless it can be impeached for fraud. Redwood Investment Co. of Stithton, Kentucky v. Exley, 64 Cal.App. 455, 459, 221 P. 973; Bailey v. Tully, 242 Wis. 226, 7 N.W.2d 837, 839, 145 A.L.R. 578; Rest., Conflict of Laws, sec. 97, comment a, secs. 430, 449; see Tully v. Bailey, 46 Cal.App.2d 195, 115 P.2d 542. It would be an anomalous situation should the Texas court decree that the stock, savings bonds, automobiles, bank accounts and safe deposit boxes, which are the subject of both actions, are the separate property of the wife, or should it award them to the wife, and the California court decree that the husband has a half interest therein. To compel the wife to litigate title to the property, the subject of the California action, separate and apart from the issues made in the Texas action, would be unfair to her and equally so to the courts.

[14, 15] The law of Texas determines when the Texas court acquired jurisdiction of the controversy. See Merritt-Chapman & Scott Corp. v. Mutual Ben. Life Ins. Co., 237 App.Div. 70, 260 N.Y.S. 374; Prudential Ins. Co. of America v. Merritt-Chapman & Scott Corp., 112 N.J. Eq. 179, 163 A. 894; Rest., Conflict of Laws, sec. 526, comment b. Under the law of Texas where a petition is filed and a process of the court is invoked thereon, even though such process is not served upon the defendant, the court thereby acquires jurisdiction of the subject matter. Cleveland v. Ward, 116 Tex. 1, 285 S.W. 1063, 1069; Barrier v. Lowery, 118 Tex. 227, 13 S.W.2d 688, 689; Long v. Long, Tex.Civ.App., 269 S.W. 207; Collins Piano Co. v. Myers, Tex.Civ.App., 150 S.W.2d 877, 879.

[16-18] The day the Texas action was filed the court there made an order enjoining the husband from using the stock certificates which are involved in the California action and appointed a receiver of them and of the seals of the corporations. Under the law of Texas the time of the appointment of a receiver is regarded as the time when a receivership commences to operate so as to bind the property subject to the receivership and to vest title in the receiver. At that time the jurisdiction of the court attaches to, and the receiver is

entitled to, the property; and it is in the custody of the law or of the court although the receiver has not qualified and has not actually taken possession of the property. Riesner v. Gulf C. & S. F. Ry. Co., 89 Tex. 656, 36 S.W. 53, 54, 33 L.R.A. 171, 59 Am. St.Rep. 84; Texas Trunk Ry. Co. v. Lewis, 81 Tex. 1, 16 S.W. 647, 649, 26 Am.St.Rep. 776; Palmer v. Texas, 212 U.S. 118, 129, 29 S.Ct. 230, 53 L.Ed. 435, 440; Re Schuyler's Steam Tow-Boat Co., 136 N.Y. 169, 32 N.E. 623, 20 L.R.A. 391, 392; 45 Am. Jur. 119, sec. 141. The effect of the appointment of the receiver by the Texas court was to place him constructively in possession of the property within the state of Texas specified in the order. Phelps v. Mutual Reserve Fund Life Ass'n., 6 Cir., 112 F. 453, 466, 61 L.R.A. 717. Further, the appointment of a receiver who takes property into his possession impresses the action with the judicial characteristics of a proceeding in rem. Murray v. Murray, 115 Cal. 266, 276, 47 P. 37, 37 L.R.A. 626, 56 Am.St.Rep. 95; Nichols v. Superior Court, 1 Cal.2d 589, 598-599, 36 P.2d 380, 95 A.L. R. 894. The receiver took the corporate seals into his possession. While he did not take the stock certificates into his possession it was because the husband had just previously removed them from the state with the apparent purpose of preventing the Texas court from acquiring jurisdiction over them. In determining the question of comity the courts of California should not sanction or give aid to the husband in this respect.

[19, 20] The rights of the parties in the property involved in both actions cannot properly be determined in the California action until the issues made in the Texas action have been adjudicated. Where the rights of the parties to the second action cannot be properly determined until the questions raised in the first action are settled the second action should be stayed. Pons v. Yazoo & M. V. R. Co., 137 La. 508, 68 So. 844; State Farm Mut. Automobile Ins. Co. v. Brooks, D.C.Mo., 43 F. Supp. 870, reversed on other grounds, 8 Cir., 136 F.2d 807; Scott v. Grow, 301 Mich. 226, 3 N.W.2d 254, 141 A.L.R. 819; In re Edwards' Will, 187 Misc. 139, 62 N. Y.S.2d 5; In re Billiard's Estate, 38 Pa. Dist. & Co. R. 256. Where, as here, a correct decision calls for the construction of the laws of a foreign jurisdiction and an action between the same parties involving the same subject matter is pending therein, our courts should await the decision in such action. Dotson's Adm'r et al. v. Ferrell, 293 Ky. 470, 169 S.W.2d 320, 321; Moore v. Maryland Casualty Co., 74 N.H. 47, 64 A. 1099.

[21-24] Equity abhors a multiplicity of actions. "It is the policy of the law to reduce to the minimum the number of actions which may subsist between the same parties." Rilcoff v. Superior Court, 50 Cal.App.2d 503, 506, 123 P.2d 540, 542. Courts should not be in collision. They should be liberal and just in determining questions which involve conflicts of jurisdiction. Races between parties likely to result in unseemly controversy between courts of different states should be frowned upon and avoided if possible. It is the duty of the court to give preference to principles and methods of procedure by which the tribunals of the states may cooperate as harmonious members of the judicial system. California courts should interpose no action to interfere with rights of the wife to which she may be entitled as a resident of Texas in an action for divorce. A conflict of authority should not occur if it can be avoided. Courts should compose rather than irritate. "Our states do not stand in the same relation to each other that foreign countries do. They are members of the same family, and section 1, art. 4, of the Constitution of the United States requires each state to give full faith and credit to the judicial proceedings of every other state. Comity between states is daily growing and should be encouraged." Hall v. Industrial Commission, 165 Wis. 364, 162 N.W. 312, 314, L.R.A.1917D, 829.

The parties are residents of Texas. The Texas action will determine all the issues involved in the California action. The courts of Texas are as competent to administer justice as those of California. A trial in Texas under the circumstances is more likely to accomplish full justice than a trial in California of the comparatively narrow issues involved in the action here.

The remedy which may be afforded by the Texas courts is equally as effective and advantageous as any that may be afforded by the California courts. Only confusion, inconvenience, and possible defeat of the rights of the wife can result from trying the California action. Further proceedings in California should be stayed where it appears, as it does in the present case, that complete justice cannot be done here, that the wife will be subjected to great and unnecessary inconvenience and expense, and that the trial, if conducted here, will be attended with many, if not insuperable, difficulties. All of this can be avoided with no hardship to the husband if the Texas action, commenced prior to the California action in the jurisdiction where the parties reside, in which the issues can be more easily and effectively tried, and in which complete justice can be done, is first heard and determined.

Since the Texas court first assumed and exercised jurisdiction and the parties are residents of that state, comity and the expediency and the practical desirability of avoiding a multiplicity of forums necessitate the holding that respondent court abused its discretion in not staying further proceedings until the final determination of the Texas action. Decent respect for Texas and its courts demands that respondent court wait until the Texas courts have spoken.

[25, 26] The remedy by appeal is neither speedy nor adequate. The question is one of fact depending on the circumstances of the particular case. The order denying the motion to stay further proceedings is non-appealable. Code Civ.Proc. § 963. The wife cannot appeal until after a trial, and bringing the action to trial is the very wrong of which she complains. If she is entitled to relief and there is no remedy now, there would be a wrong without a remedy. A trial here would involve heavy expense in transporting witnesses, books and records which could not be recovered as legal costs. The expense and delay involved in a trial render an appeal from an eventual judgment an inadequate remedy. Ophir Silver Min. Co. v. Superior Court, 147 Cal. 467, 478, 479, 82 P. 70, 3 Ann.Cas. 340; Consolidated Adjustment Co. of California v. Superior Court, 189 Cal. 92, 96, 207 P. 552; A. G. Col Co. v. Superior Court, 196 Cal. 604, 621, 238 P. 926; Jardine v. Superior Court, 213 Cal. 301, 305, 2 P.2d 756, 79 A.L.R. 291; Gorbacheff v. Justice's Court, 31 Cal.2d 178, 180, 187 P.2d 407; Northwestern Pac. R. R. Co. v. Superior Court, 34 Cal.2d 454, 458, 211 P.2d 571; Brown v. Superior Court, 34 Cal.2d 559, 212 P.2d 878. Alexander v. Superior Court, 91 Cal.App. 312, 316, 266 P. 993.

[27] The parties do not question the propriety of prohibition as a remedy. We think, however, that the petition prays for the wrong relief. We think it cannot be said that respondent court is proceeding without or in excess of its jurisdiction in any of the different meanings in which the word "jurisdiction", Abelleira v. District Court of Appeal, 17 Cal.2d 280, 287, 291, 109 P.2d 942, 132 A.L.R. 715, is used. Brock v. Superior Court, 29 Cal.2d 629, 630, 177 P.2d 273, 170 A.L.R. 521. Mandate lies to control judicial discretion when that discretion has been abused. Inglin v. Hoppin, 156 Cal. 483, 488, 491, 105 P. 582; Golden State Glass Corp. v. Superior Ct., 13 Cal.2d 384, 396, 90 P.2d 75; Evans v. Superior Court, 14 Cal.2d 563, 581, 96 P.2d 107; Hays v. Superior Court, 16 Cal.2d 260, 265, 105 P.2d 975. In the Hays case the court stated, 16 Cal.2d at page 266, 105 P.2d at page 979: "'An abuse of discretion, however, is not the exercise of discretion, but is action beyond the limits of discretion, and it is settled that the writ [mandate] will issue to correct such abuse if the facts otherwise justify its issuance.' 16 Cal.Jur., pp. 810 and 811. The law on the availability of the writ of mandate as a remedy was clarified shortly after the decision in the case [San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 99 P. 359, 17 Ann.Cas. 933] under discussion. In Ex parte, Ford, 160 Cal. 334, 116 P. 757, 35 L.R.A.,N.S., 882, Ann.Cas.1912D, 1267, this court expressly disapproved its former ruling in Strong v. Grant, 99 Cal. 100, 33 P. 733, and declared that the writ of mandate would issue to correct an abuse of discretion. See, also, Inglin v. Hoppin, 156 Cal. 483, 491, 105 P. 582. We are therefore of the view that said reference to the absence of discretion in San Francisco

Gas & Elec. Co. v. Superior Court, supra, was not necessary to the decision as the court there might well have stated that the remedy by writ of mandate was available as the facts showed a clear abuse of discretion."

[28, 29] There is no reason why, with all the facts before us, we should not grant such appropriate relief as the record warrants. Bd. of Trustees v. State Bd. of Equalization, 1 Cal.2d 784, 787, 37 P.2d 84, 96 A.L.R. 775. Where there is need for immediate relief to avoid useless litigation in the obvious case, that relief should be granted. The relief actually sought is a stay of all proceedings in the California action. The record shows that petitioner is entitled to that relief but pursuant to a writ of mandate rather than pursuant to a writ of prohibition. In Fritz v. Superior Court, 18 Cal.App.2d 232, 63 P.2d 872, it was held that when the facts developed upon the hearing show that petitioner is entitled to the relief sought, but under a different form of writ than that prayed for, the court will grant the proper form of writ. The petition prayed for a writ of prohibition. A writ of mandate was granted. See, also, Caminetti v. Superior Court, 16 Cal.2d 838, 848, 108 P.2d 911; Golden State Glass Corp. v. Superior Court, 13 Cal.2d 384, 389, 90 P.2d 75; Van Tiger v. Superior Court, 7 Cal.2d 377, 384, 60 P.2d 851; Brouwer v. Superior Court, 130 Cal.App. 163, 168, 19 P.2d 834.

Let a peremptory writ of mandate issue commanding respondent court to stay all further proceedings in that certain action entitled "Frank A. Simmons v. Mrs. Frank A. Simmons, et al.," No. 555768, until the final determination of that certain action pending in the District Court of Harris County, Texas, entitled "Helene Simmons v. Frank A. Simmons," No. D-363483, and in the event said action No. D-363483 is finally terminated and adjudicated in favor of the plaintiff therein, the defendant in action No. 555768 be allowed to amend her answer to plead such judgment in bar.

SHINN, P. J., and WOOD, J., concur.

Hearing denied; SCHAUER, J., dissenting.

CAVERO v. FRANKLIN HOSPITAL.

Civ. 14153.

District Court of Appeal, First District,
Division 2, California.
Feb. 23, 1950.

Rehearing Denied March 25, 1950.
Hearing Granted April 20, 1950.*

Action by Henry Cavero against the Franklin Hospital, a corporation, for negligence in the performance of a tonsillectomy.

The Superior Court of San Francisco County, James G. Conlan, J., entered judgment for plaintiff and defendant appealed.

The District Court of Appeal, Dooling, J., held that since the proof was not that the infant died from blood collecting in its lungs, as charged, but that death resulted from an overdose of ether, there was a material variance between the complaint and the evidence which amounted to a failure of proof.

Judgment reversed.

1. Dismissal and nonsuit 🔑58(5)

A motion for nonsuit was a proper way to raise the question of material variance.

2. Hospitals 🔑8

In action for negligent performance of tonsillectomy against hospital in which proof was not that infant died from blood in lungs, as alleged, but from overdose of ether, but plaintiff did not amend complaint, there was failure of proof. Code Civ.Proc. § 471.

3. Judgment 🔑19

Where there is a material variance amounting to a failure of proof, the evidence will not support the judgment.

4. Appeal and error 🔑197(5)

In action for alleged negligent performance of tonsillectomy in which proof was not that infant died from blood in lungs, as alleged, but from overdose of ether and defendant moved for a nonsuit at close of plaintiff's case and for directed verdict at close of evidence on ground that plaintiff had failed to prove material allegations of his complaint and that there was a material variance between pleading and proof, there could be no waiver, since defendant pointed out fatal variance in trial court.

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* Subsequent opinion 223 P.2d 471.

5. Appeal and error ⚿1039(13)

In action for negligent performance of tonsillectomy by defendant hospital in which proof was not that infant died from blood in lungs, as alleged, but from overdose of ether and anesthetist, whose negligence was claimed to have resulted in the lethal dose of ether, was not available at trial, plaintiff's change of theory was prejudicial.

6. Hospitals ⚿8

The mere fact of patient's death while in operating room does not justify application of the res ipsa loquitur doctrine.

7. Master and servant ⚿301(4), 332(1)

The general rule in cases involving the furnishing of a general employee to assist a third person is that the question whether the employee becomes the temporary employee of such third person is one of fact and in order to relieve general employer of liability under doctrine of respondeat superior, general employer must resign full control of employee for the time being.

8. Hospitals ⚿8

In action for alleged negligent performance of tonsillectomy by defendant hospital, whether an anesthetist, although employed generally by defendant, became, during the operative procedure, the temporary employee of the surgeons, was for jury.

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Hadsell, Sweet, Ingalls & Murman, San Francisco, for appellant.

Hallinan, MacInnis & Zamloch, James Martin MacInnis, San Francisco, for respondent.

DOOLING, Justice.

Defendant, Franklin Hospital, appeals from a judgment against it based upon the death of a three year old child in the course of a tonsillectomy performed in appellant's hospital. Appellant contends that there was a material variance between the complaint and the evidence which amounted to a failure of proof. Section 471, Code Civ.Proc.

The charging part of the complaint was in the following language:

"VIII

"That on or about the 5th day of July, 1946, at the said Franklin Hospital in the City and County of San Francisco, State of California, defendants herein, and each of them, undertook for good and valuable consideration, to perform, and they did perform, a tonsillectomy upon the person of the said minor child, Daniel Henry Cavero of the approximate age of three years; that at said time, place and occasion defendants, and each of them, so carelessly, negligently and recklessly performed the said tonsillectomy operation as to then and there cause the said infant child, Daniel Henry Cavero, to suffer and sustain a severe hemorrhage therefrom, and did carelessly, negligently and recklessly allow hemorrhagic material to flow unchecked into the lungs of the said infant child;

"IX

"That as a direct and proximate result of the carelessness, negligence and recklessness of the defendants, and each of them, said infant child was caused to, and did then and there, suffocate and drown in its own blood, and upon said time, place and occasion, said infant child did die upon the operating table."

The proof was not that the infant died from blood collecting in its lungs as charged but that the infant died from an overdose of ether. Respondent asserts, without any supporting analysis of the pleading, that: "The charging paragraph, couched * * * in the most general terms, follows, and, from the utter generality of the language, it can quickly be concluded that there is no variance at all between the pleading and proof in this case." The charging part is not general in its language but specific. It alleges negligence in specific language in two respects and two respects only: 1. that defendants so negligently performed the operation as to cause the child to suffer a severe hemorrhage; and 2. that defendants negligently allowed hemorrhagic material to flow into the child's lungs. Neither charge was proved. Instead as above noted, the only evidence produced in the case to support a finding of negligence was that the child died from an overdose of ether.

[1, 2] Appellant moved for a nonsuit at the close of plaintiff's case, and for a directed verdict at the close of the evidence, on the ground that plaintiff had failed to prove the material allegations of his complaint and that there was a material variance between pleading and proof. It thus preserved its record for an appeal, since a motion for nonsuit is a proper way to raise the question of material variance. Brazil v. Pacific American Petroleum Co., 108 Cal.App. 737, 738, 292 P. 275; Von Goerlitz v. Turner, 65 Cal.App.2d 425, 431, 150 P.2d 278; 9 Cal.Jur. 561. Respondent did not ask leave to amend his complaint and elected to stand on his pleading. This brings into play sec. 471, Code Civ.Proc., above cited: "Where * * * the allegation of the claim * * * to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance * * * but a failure of proof."

[3] It is well settled that where there is such a material variance, amounting to a failure of proof, the evidence will not support the judgment. Lavely v. Nonemaker, 212 Cal. 380, 385, 298 P. 976; Marovich v. Central California T. Co., 191 Cal. 295, 306, 216 P. 595; Kredo v. Phelps, 145 Cal. 526, 528; Munfrey v. Cleary, 75 Cal.App.2d 779, 784, 171 P.2d 750; Wills v. Price, 26 Cal. App.2d 338, 342, 79 P.2d 406; Johnson v. De Waard, 113 Cal.App. 417, 422, 298 P. 92; Gillin v. Hopkins, 28 Cal.App. 579, 153 P. 724; 21 Cal.Jur. 267.

[4, 5] Courts have been liberal in finding a waiver in such cases, but there can be no waiver here since appellant expressly pointed out the fatal variance in the trial court. That the change of plaintiff's theory was prejudicial is apparent from the fact that the anesthetist whose negligence is claimed to have resulted in the lethal dose of ether was not available at the trial.

[6] A res ipsa loquitur instruction was given at the request of other defendants. The case was different from Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258 and Dierman v. Providence Hospital, 31 Cal.2d 290, 188 P.2d 12. In the Ybarra case the patient suffered a traumatic injury while under anesthetic and in the Dierman case an anesthetic tank exploded. These unusual occurrences were the bases for invoking the res ipsa rule. No cause has been cited that the mere fact of the patient's death while in the operating room justifies the application of the res ipsa doctrine. To so hold would revolutionize the rule that in malpractice cases generally expert testimony must be the basis of any recovery. 9 Cal.Jur. 10 Yr.Supp., 1949 Revision, Physicians and Surgeons, sec. 46, p. 240; Engelking v. Carlson, 13 Cal.2d 216, 221, 88 P.2d 695. The giving of the res ipsa instruction was improper under the facts of this case.

[7, 8] Appellant argues also that the anesthetist although employed generally by appellant became, during the operative procedure, the temporary employee of the surgeons, citing Ybarra v. Spangard, supra, 25 Cal.2d. 486, 154 P.2d 687, and Ware v. Culp, 24 Cal.App.2d 22, 74 P.2d 283. The latter case involved a special nurse employed by the patient and is not in point. In the Ybarra case the court said, 25 Cal.2d at page 492, 154 P.2d at page 690: "that while the assisting physicians and nurses may be employed by the hospital, or engaged by the patient, they normally become the temporary servants or agents of the surgeon in charge while the operation is in progress * * *." The general rule in the cases involving the furnishing of a general employee to assist a third person is that the question whether the employee becomes the temporary employee of such third person is one of fact, and that in order to relieve the general employer of liability under the doctrine of respondeat superior the general employer must resign full control of the employee for the time being. Moss v. Chronicle Pub. Co., 201 Cal. 610, 258 P. 88, 55 A.L.R. 1258. The court properly left this question to the jury under instructions correctly stating the applicable rule of law.

Judgment reversed.

NOURSE, P. J., concurs.

96 Cal.App.2d 234

In re BARTON'S ESTATE.

Civ. 7767.

Sac. 6065.

District Court of Appeal, Third District, California.

Feb. 27, 1950.

Proceeding in the matter of the estate of M. Elva Barton, deceased.

The Superior Court of Glenn County, W. T. Belieu, J., rendered a decree in settling the account of Neal Butler, also known as Neal D. Butler, trustee, allowing him $3,000 as compensation for his services in management of orchard, and Helen Newcomb and others, as beneficiaries, appealed.

The District Court of Appeal, Sparks, J., held that decree of distribution entitled trustee to ten per cent of the moneys collected by him as manager of orchard, and that because of mutual mistakes, trustee was not bound by contract with beneficiaries that he would accept the sum of $200 a year as compensation.

Decree affirmed.

1. Trusts ⟹315(2)

Where will creating trust specifically fixes and determines compensation of trustee, he is entitled to that amount and no more. Civ.Code § 2274.

2. Appeal and error ⟹931(1), 1010(1)

Findings of trial court must be sustained if they are supported by substantial evidence, and all reasonable and legitimate inferences may be indulged towards upholding them.

3. Appeal and error ⟹931(1)

Appellate courts, if there be any reasonable doubt as to sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding, and in searching the record and exploring the inferences which may arise from what is found there, to discover whether such doubt or conflict exists, courts should be realistic and practical.

4. Trusts ⟹315(2)

Where testatrix during lifetime took complete charge of orchard during harvesting season and remained there for three months in the year, and during her lifetime trustee's management duties for which he received on an average of only about $50 and $75 a year, were not great, and after testatrix' death, trustee took over complete management of orchard and performed duties formerly performed by testatrix, award to trustee of ten per cent of moneys collected by him was proper under decree of distribution stating that trustee should receive compensation on the same "basis" as he received during lifetime of testatrix.

5. Contracts ⟹93(5)

Generally, where an agreement is founded on a mutual mistake of fact which is material and goes to essence of contract, relief will be granted to the one against whom it is sought to be enforced. Civ. Code, §§ 1567, 1578.

6. Trusts ⟹315(2)

Where at time trustee and beneficiaries entered into contract that beneficiaries would pay and trustee would accept $200 a year for managing trust realty consisting of large orchard and small pasturage, they were laboring under a mistake of fact that his compensation under decree of distribution was limited to ten per cent of pasturage rentals, trustee was not precluded by the agreement from recovering ten per cent of profits from orchard. Civ.Code, §§ 1567, 1578.

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Tanner, Odell & Taft, Everett Shilling, Los Angeles, for appellants.

W. E. Johnson, Orland, Ware & Ware, Phil Ware, Chico, for respondent.

SPARKS, Justice pro tem.

This is an appeal from a decree settling an account of the trustee and allowing him the sum of $3,000 as compensation for his services rendered during the period covered by the account. The trust was created by the will of M. Elva Barton, Deceased, and appellants are the beneficiaries thereunder.

By the terms of the decree of distribution respondent, Neal Butler, was granted as trustee "exclusive, sole, absolute and uncontrolled discretion" in the management of the trust property, which consisted of a ranch and certain farming equipment, with the provision that he should distribute annually to the beneficiaries the net income therefrom. The decree of distribution was made on March 18, 1941, and shortly thereafter the trustee went into possession and assumed his duties as such trustee.

The ranch was successfully operated under his supervision, and more than $35,600 was collected and accounted for by him from farm crops and ranch income. During the period of his accounting he distributed to the beneficiaries as net income an amount in excess of $18,000. In 1945 the corpus of the trust was sold by the trustee for $21,000, and an additional sum of $7,000, representing initial payments on the sale price, was collected by the trustee from the buyer and in the year 1946 distributed to the beneficiaries.

The orchard portion of the property consisted of 20 acres of prune trees and 5 acres of prune and almond trees, and in addition thereto there was some pasture land. Respondent's father had planted the larger portion of the orchard in 1917, and had looked after the property for Mrs. Barton until his death in 1928. Respondent then took over the supervision of the property under a method of compensation which will be discussed hereinafter.

Appellants' principal contention is that the trial court erred in allowing the trustee compensation in the sum of $3,000 for the reason that the decree of distribution limited the amount the trustee might receive, and that the trial court was without authority to allow any sum in excess thereof.

The particular portion of the decree in issue reads as follows: "Said trustee shall receive compensation for his services as such trustee upon the same basis as his services have been compensated for during decedent's lifetime."

During the lifetime of M. Elva Barton the respondent was receiving, as fees for management services, a sum representing ten per cent of the amounts collected by him from pasturage rental, and in addition thereto received payment for actual labor performed by him. Under this arrangement his compensation for management averaged between $50 and $75 per year.

[1] It is true that when an instrument by which a trust is created specifically fixes and determines the compensation of the trustee he is entitled to that amount and to no more. Civ.Code, § 2274; In re Estate of Whitney, 78 Cal.App. 638, 248 P. 754.

In the Whitney case the court held that the will having limited the amount which the trustees should receive as compensation, their acceptance of the trust constituted an agreement to receive the amount specified and they could be allowed no greater amount.

However, in its written opinion, which is made part of the record on appeal, the trial court said: "That the settlor of the trust intended a reasonable rather than an insignificant compensation to the trustee, is further supplemented by the fact that Neal Butler had been intimately acquainted with the settlor of the trust for many years; he was, and she knew him to be, a man of sterling character; a skilled and experienced orchardist and farmer of many years experience; that under the trust he would have sole and absolute operation of a large and valuable orchard property; that such undertaking would require and take considerable of his personal time and attention to successfully manage a valuable property in that he would be required to and he did cause the land to be plowed, harrowed, leveled and fertilized; he did properly prune, spray and irrigate the fruit trees; gather, dehydrate, process and market the fruit crops; care and account for all receipts and disbursements in connection therewith; which receipts amounted to approximately $35,600.00 during the period accounted for, and which he has charged himself with in his account. The settlor of the trust undoubtedly knew that the minor services rendered by Neal

Butler during her life time was in no manner comparable to the difficult task and undertaking imposed by the trust after her death."

In accordance with its opinion the trial court made the following finding of fact: "The Court further finds and determines that the word 'basis' contained in the declaration of trust above quoted, should be construed to mean, and does mean, the same percentage of all money which was agreed to be paid him for his services during the lifetime of the settler of the trust. This was 10% of the moneys collected and handled by the trustee. This method of estimating the trustee's compensation should be applied to the moneys received by him as trustee during the period accounted for."

Appellants attack this finding as not being supported by the evidence.

[2, 3] The familiar rule on appeal is, of course, that the findings of the trial court must be sustained if they are supported by substantial evidence, and all reasonable and legitimate inferences must be indulged towards upholding them. In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689. In the case of Fackrell v. City of San Diego, 26 Cal.2d 196, at page 207, 157 P.2d 625, at page 630, 158 A.L.R. 773, the Supreme Court reiterated the rule as follows: "* * * Appellate courts, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding; and in searching the record and exploring the inferences which may arise from what is found there, to discover whether such doubt or conflict exists, the court should be realistic and practical."

The record here unquestionably shows that after the death of M. Elva Barton the duties of Butler were substantially increased over those he had formerly performed. This was due for one reason to the fact that Mrs. Barton had in her lifetime taken complete charge of the property during the harvesting season. She would come to the ranch during that important period and remain there for three months. During the harvest she not only supervised the orchard work, but managed the marketing of the fruit and nuts. Also prior to her death Butler had nothing to do with the financial management of the ranch, except in the single instance of collecting the pasturage rentals. On the other hand, as trustee he was required to receive all the ranch income from every source, and to expend the same as required, as shown by the many items of his account. This necessitated the keeping of books, filing of income tax returns, payment of taxes and other charges. In addition, he had to shoulder the burden of complete management which theretofore had been the responsibility of Mrs. Barton.

It is apparent that respondent as trustee entered into a much broader scope of duties and assumed responsibilities materially greater and more onerous than those fulfilled by him during Mrs. Barton's lifetime. In this larger field he was of necessity required to devote more of his time and personal effort to the management of the trust property. In so doing he incurred considerable expense which he makes no claim for in his account. As a result of the exercise of his skill and attention to duty, the trust and its beneficiaries profited. Had the trustor intended that Butler should be restricted in his compensation to only the nominal amount urged by appellants, she could have easily so specified, namely, by stating that he should receive in full for his services ten per cent of the pasturage rental.

The trial court's finding that the language of the will fixing compensation "upon the same basis" meant on the same percentage of all moneys realized from the operation of the property is further supported by evidence that a ten per cent overall fee was considered reasonable in that district for complete management services. One witness of long experience in farming in the vicinity testified that a fair fee for such management would be from fifteen to eighteen per cent of the gross income.

In opposition to the foregoing, appellants stress the fact that the trustee himself during the existence of the trust labored under the impression that his compensation was limited to ten per cent of the pasturage collections. In support thereof they quote portions of letters written by respondent to the beneficiaries or their representatives. Also they point to certain additional allowances which were solicited by the trustee from the beneficiaries and ultimately paid to him by them as constituting admissions on his part that he was only entitled to the ten per cent of the pasturage collections. These points, however, merely raised conflicts in the evidence which it was the province of the trial court to resolve.

[4] After reviewing the evidence and giving to it all the legitimate and reasonable inferences to which it is entitled this court must hold that it was sufficient, and substantially supported the finding in question.

As stated above, respondent did solicit from the beneficiaries during the continuance of the trust the payment to himself of certain amounts in addition to the percentage collected from pasturage rentals. The sum requested by respondent was $600 per year, which after some correspondence between him and the beneficiaries was acquiesced in by them, and paid. In accordance with this arrangement, respondent received from the beneficiaries $1,400, which, together with the collections on the pasturage in the sum of $236.61, constituted the total compensation received by him during his tenure as trustee.

Appellants contend that the sum of $1,400 was obtained from the beneficiaries through the exercise of undue influence on them, and was without consideration. They attack the finding of the trial court to the contrary and urge that the said sum of $1,400 should be returned to the beneficiaries and respondent be limited in his compensation to the sum of $236.61.

The point loses its force, however, by reason of the conclusions hereinbefore announced. The total amount advanced by the beneficiaries and received by Butler was less than the compensation to which he was entitled under the provisions of the will, and, in any event, was ordered repaid by the trial court, in the sense that such advances were duly credited upon the total fee of $3,000 allowed to the trustee.

One further point remains for consideration, namely, whether or not the authorization of the beneficiaries to pay respondent the sum of $200 per year, and the acceptance by him of the amounts so paid, constituted an agreement fixing his compensation and precluding the allowance of any additional amount. It is true that the trustee stipulated that he would not ask any further compensation beyond January 1, 1946. However, it is patent that both the trustee and the beneficiaries were laboring under a mistake of fact, towit, that his compensation was limited to ten per cent of the pasturage rentals.

[5, 6] The general rule is that where an agreement is founded upon a mutual mistake of fact which is material and goes to the essence of the contract, relief will be granted to the one against whom it is sought to be enforced. Civ.Code, §§ 1567, 1578; 12 Am.Jur. p. 618, sec. 126; Rued v. Cooper, 119 Cal. 463, 51 P. 704; Hannah v. Steinman, 159 Cal. 142, 112 P. 1094; Spiegelman v. Metropolitan Life Ins. Co., 21 Cal.App.2d 299, 68 P.2d 1006.

The sum of $3,000 allowed respondent as compensation was not only less than the amount provided for in the decree of distribution, but was also found by the trial court to be fair and reasonable.

The allowance of such an amount will, therefore, be approved. The order and decree settling account is, accordingly, affirmed.

ADAMS, P. J., and PEEK, J., concur.